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RAMSAY'S

APPEAL CASES

WITH

NOTES AND DEFINITIONS

OF THE

CIVIL AND CRIMINAL LAW OF THE PROVINCE OF QUEBEC

INCLUDING A LARGE NUMBER OF DECISIONS IN APPEAL OTHERWISE UNREPORTED AND BROUGHT DOWN TO THE BEGINNING OF THE YEAR 1887.

To which is appended a list of all the cases carried to the Supreme Court and Privy Council with the text of the judgments in the Privy Council.

— BY —

THOMAS KENNEDY RAMSAY

Late Judge of the Court of Queen's Bench for the Province of Quebec

EDITED BY

CHARLES HENRY STEPHENS

ADVOCATE, AUTHOR OF QUEBEC LAW DIGEST.

8°

MONTREAL

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EDITOR'S REMARKS.

This work, left in manuscript by the late Judge Ramsay, is a Digest or Alphabetical Synopsis of all the judgments in Appeal from the time the late Judge was appointed to the bench—that is from the year 1873 to the end of 1886—illustrated throughout by the learned judge's own notes and opinions On the first sheet of the manuscript are the words:

"*Commencé le 7 Avril* 1884, *lundi de la semaine sainte*,"

so that we may assume that the work occupied all the leisure time of the learned Judge during a period of nearly three years.

As far as possible it is published in the condition in which it was left. Although the Judge evidently considered it finished, there were naturally a number of points here and there overlooked, and which had to be supplied as well as possible from sources of information different from those used by the author. Other things which will probably be considered as peculiarities, such as the names of the judges in each case, and of those dissenting, with occasionally the opinions of those who dissented, were manifestly intended to remain and have so been left.

The number of unreported cases is unexpectedly large, comprising nearly, if not quite, one half of the total number of judgments in

Appeal during the last thirteen years. It need scarcely be pointed out that, dealing only with the decisions of the Court in which he sat, and during the time he sat in it, all the judgments and references cannot but be regarded as emanating from the most reliable sources. As the most important of these judgments were carried to higher courts, and there either confirmed or reversed, the Editor has seized the opportunity to add in an Appendix, a list of such cases, giving for the first time a collection of the judgments in the Privy Council on cases referred to in the body of the work, that is in all cases from this province during the last thirteen years.

The work, it may readily be believed, will be found a most valuable addition to the text books of this province, and a most valuable aid to the practitioner.

MONTREAL, Sept. 15, 1887.

C. H. S.

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ABBREVIATIONS.

C. C.—Civil Code.

C. C. P.—Code of Procedure.

C. J.—Chief Justice.

Dec. d'A.—Décisions de la Cour d'Appel.

Dis.—Dissenting.

J.—Lower Canada Jurist.

Leg. News.—Legal News.

M.—Montreal.

M. C.—Municipal Code.

M. L. R.—Montreal Law Reports.

Q.—Quebec.

Q. L. R.—Quebec Law Reports.

Rep.—Reported.

Rev. Leg.—Revue Légale.

S. C.—Superior Court.

S. C. Rep.—Supreme Court Reports.

RAMSAY'S APPEAL CASES.

A

ABANDONMENT.—Is the act of giving up or deserting; but specially in law, abandonment is the notice given to the insurer by the assured in cases of marine insurance, where there is a constructive total loss, that the latter abandons to the former all interest in the thing insured. C. C. 2538, 2543. It is also applied to the discontinuance or withdrawal of a suit in a jury trial. C. C. P. 395; and to the cession made by a debtor arrested on *capias*. C. C. P. 363. Any person having a common right in a wall may abandon his share in it and renounce to its use, and thus avoid contributing to its repair C. C. 513 *v.* ACTION—CAPIAS—INSURANCE (*Marine*)—JUDGMENT.

ABDUCTION.—Is applied to the unlawful taking away of a woman or girl by force or fraud. Special statutes define and fix punishments for these offences.

"Where any woman of any age has any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate, or is a presumptive heiress or co-heiress or presumptive next of kin, or one of the presumptive next of kin to any one having such interest, whosoever from motives of lucre, takes away or detains such woman against her will with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever fraudulently allures, takes away or detains such woman, being under the age of twenty-one years, out of the possession and against the will of her father and mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her or to cause her to be married or carnally known by any other person is guilty of felony, and shall be liable to be imprisoned in the penitentiary for any term not exceeding fourteen years and not less than two years,—or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour; and whosoever is convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any such interest, or which shall come to her as such heiress, co-heiress or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in Ontario, the Supreme Court in Nova Scotia or New Brunswick, or the Superior Court in Quebec, shall appoint, upon any information at the suit of the Attorney General for the Province in which the property is situated. 32-33 Vic. ch. 20, s. 54.

"Whosoever by force takes away or detains against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, is guilty of felony, and shall be liable to be imprisoned in the penitentiary for any term not exceeding fourteen years and not less than two years,—or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour." Id. s. 55

"Whosoever unlawfully takes or causes to be taken any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother or of any other person having the lawful care or charge of her, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a penitentiary, for any term less than two years, with or without hard labour." Id. s. 56.

ABSENTEE.—An absentee, within the meaning of title fourth, bk. 1, C. C., is one who having had a domicile in Lower Canada has disappeared, without any one having received intelligence of his existence. C. C. 86.

But persons who never had a domicile are sometimes subjected to the same liability as absentees. So, if the defendant has left his domicile in Lower Canada, or has never had such domicile, but has property there, upon a return stating that he cannot be found in the district, may be ordered to appear within two months. C. C. P. 68.

Without prejudice to the foregoing mode of summons, a defendant who has not and who never had any domicile in the Province of Quebec, but who resides in the Dominion of Canada, may be served with summons at his domicile, leave being granted by the judge or proper officer, on affidavit, (1) if he has property in the Province of Quebec, or (2) when the cause of action arose there.

But an action for the liquidation of a partnership begun in Jersey, whose chief place of business was there, cannot be instituted in this Province, by a person having no domicile and who never had any domicile here, but was domiciled and resident in Jersey against co-partners who likewise have not and never had any domicile here, the cause of action (the alleged dissolution of partnership)not having arisen here, and the parties not having been personally served here, although the said partnership had carried on business in this Province and was possessed of property here. *Gosset & Robin* Q. Judgment confirming 18 June, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn and Tessier, JJ., Monk and Ramsay, JJ., dis. Rep. 2 Q. L. R. 91.

One, who never had any domicile in Lower Canada, cannot be called in by advertisement, under art. 68 C. C. P., because it is alleged that he is the owner of a *bon*, if the *bon* be not produced, and if it does not appear by the pleading and proof what the nature of the *bon* was, nor to whom, nor where it is payable, nor without proof that the *bon* is in existence and that it was the property of the defendant at the time of the institution of the action. *Poirier & Lareau*, judgment reversing 21 Dec., 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn and Tessier, JJ. *v.* BON—PROM. NOTE—JURISDICTION—SERVICE BY ADVERTISEMENT—SUMMONS.

ACCEPTANCE.—Is the signification in the form required by law of one's willingness to be bound contractually. *v.* COMMUNITY—BILL OF EXCHANGE—GIFT—LEGACY—SALE—SUCCESSION (*under Benefit of Inventory*)—TRANSFER.

The acceptance of an indication of payment by a person, not authorized, does not make it a perfect delegation, so as to prevent the vendor from accepting payment from the purchaser. *Gerin-Lajoie & Desaulniers.* Q. Judgment confirming, 7 Dec. 1881. Sir A. A. Dorion C. J., Ramsay, Tessier, Cross, Baby, JJ. 2 Dec. d'A. 241.

ACCESSION.—The right of the owner to all his property produces, and to all that is joined to it as an accessory, is called the right of accession. C. C. Art. 408. *v.* ACCESSORY.

ACCESSORY.—The accessory in civil law is what accompanies the principal thing, what joins itself to it or unites itself with it. Merlin *vo. accessoire.* And so as to property all that it produces, or is joined to it, to form part of it, C. C. art. 408. And so in sale all that is designed for the perpetual use of the principal must be delivered. C. C. art. 1499. Securities, privileges and hypothecs are accessories of a debt. C. C. art. 1574. In criminal law, "an accessory is he who is not the chief actor in the offence, nor present at its performance, but is someway concerned therein, either before or after the fact committed." 4 Blackstone, 35.

The accessory passes with the thing sold; but what is an accessory, is a matter of fact and it is not sufficient to show that a thing was used along with another thing to establish that the one

was the accessory of the other. *Bell & Gardener et al.* Judgment confirming, 14 June, 1878, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ., Monk, J., dis.

Article 435 C. C., does not declare that the property of material belonging to another is transferred to the workman when the added workmanship is so important that it greatly exceeds the value of the material employed. The workman has only the faculty of retaining the thing on paying the owner the price of the material, and thus becoming the owner. *Beard & Milliken.* Judgment confirming, 31 Oct. 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Rep. 6 Leg. News, 381. (1)

And so where settlers, in good faith, cut timber included in the timber reserve of another, made it into logs and drew it to the *jetée* for transportation, and the logs were seized by the owner of the reserve, and the value of the standing timber was about $310, and the value of the logs, including the cost of transport to the *jetée*, was four times as great, the seizure will be maintained and the party who made the logs will be ordered to deliver them up unless he pays $310, the value of the standing timber. (arts. 434-5 C. C.) *Reynor et al. & Thompson*, Q. Judgment confirming as regards the seizure, but reforming as regards the amount, the S. C. having made appellants liable for the value of the loss, instead of the value of the standing timber, 7 Dec., 1882. Sir A. A. Dorion, C.J., Ramsay, Tessier Cross, Baby, JJ. (2) Rep. 3 Dec. d'A. 75, 5 Legal News 421, 12 Rev. Leg. 150.

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(1) NOTE. Article 434, C. C. says, "*was* the owner," and art. 435, C. C. says, the workmanship is *then* considered as "the *principal* part." The chief justice treated these as *vices de rédaction* which the doctrine must correct.

(2) NOTE. This Court appears to have made no distinction between the cost of transport and workmanship. Possibly it did not signify in the particular case; and at all events, the carriage of an article from a place where it has little or no commercial value to a place where it must almost necessarily be brought, and on which its main value depends, seem to stand on the same footing as the workmanship. However, the articles do not say so, and it would be easy to suggest extreme cases where it would be difficult to maintain the doctrine extended.

ACCOUNT.—Is the statement furnished by one who has, or has had, the administration of the property of another, or in which another has an interest, or on whom such administration devolves by law, and who, in the language of the civil law, is called *comptable.* "Every tutor is accountable for his administration when it has terminated." C. C. art. 308. And in certain cases before it has terminated, C. C. art. 309. "Upon the dissolution of the partnership, each partner or his legal representative may demand of his co-partners an account and partition of the property of the partnership;" &c. C. C. art. 1898. *v.* COMMUNITY—BENEFICIARY HEIR.

Where an account has been rendered and accepted, the Tutor cannot be called upon to render another account without asking to have the first account set aside. *Desgroseilliers & Riendeau et vir.*, M. Judgment reversing, 22 June 1873. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

An action to account will be dismissed on demurrer if it appear by the allegations of the declaration that the Defendant has accounted, and that there has been a settlement, if there be no conclusions to set the settlement aside. *Chevalier & Cuvillier et al*, M. Judgment confirming, 21 June 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 2 Leg. News 239.

Where an administrator has rendered an account to his ward, and paid over the balance apparently due to her, which account and balance have been accepted by her, she cannot sue for a new account without conclusions to set aside the former account. *Pierce & Butters.* M. Judgment reversing, 17 Dec.

1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News, 28 & 24 J. 167.

Le tuteur dont la tutelle a été annulée, et qui a rendu un compte de son administration aux nouveaux tuteurs, qui lui ont succédé, et qui ont reçu les pièces justificatives, et le reliquat de compte reconnu par le rendant compte, n'est pas tenu de rendre un autre compte en justice, et que les nouveaux tuteurs qui n'ont pas accepté le compte qui leur a été rendu avec les formalités requises par la loi, n'ont d'action que pour débattre et faire reformer le compte présenté, et non une action en reddition de compte. *Methot & Dufort et vir.* Q. Judgment reversing, 8 Oct. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 262.

Where an administrator has accounted he will not be ordered to account again because certain vouchers are wanting. The obligation to produce vouchers is to produce those the administrator has, but he may justify his payments by other legal evidence. *Hart & Hart.* Judgment confirming 17 Dec. 1879. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 3 Leg. News, 24, and 24 J. 161.

The Secretary-Treasurer of a building Society who has left the service of the Society and handed over all his books and vouchers to the Society is entitled to a judgment discharging his security and to radiate the hypothec on his property given as security for his faithful administration, within a delay fixed by the Court, and in default of giving such deed the judgment to stand therefor. *La Société Permanente de Construction & Longtin.* Judgment confirming, 22 June 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where the account rendered by a tutor, or one acting as tutor, was irregular and rendered without vouchers, he may be compelled to account anew, by an action seeking to set aside the former account as irregular and fraudulent, although there may be a notarial discharge. *Miller & Coleman et vir.*—Judgment confirming, June 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An action to account will lie against the administrator of a joint-adventure.

But the administrator will only be obliged to pay the *reliquat de compte* in the form in which he obtained it. Thus he will not be condemned to pay the face value of stock, unless he fails to tender such stock within a period to be fixed by the Court.

Semble, it will be presumed stock is of the value it bears on its face, unless there be evidence to the contrary. *Foley & Stuart.* M. Judgment modifying. 21 Dec. 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 20 J., 183.

There was a joint-adventure for the purchase of certain real estate in the name of appellant. The partners were, on certain conditions, each to have a share. It appears they left appellant to bear the amount of the acquisition, and he afterwards sold the property for his own profit. Respondent sued for his share of the price of sale. The appellant tendered an account of his transaction. The action should have been to account, but the appellant having tendered an account covered the irregularity. *Brewster & Lamb.* Judgment confirming 22 Dec. 1879, Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ.

The appellant brought suit against the Respondent, alleging a purchase by them jointly of certain promissory notes and securities which the Respondent collected for their common profit, the appellant's share, acknowledged by the Respondent, being $713.75; the appellant added the common assumpsit counts, and prayed for an account in the usual form with vouchers, and that, in default, the Respondent should be condemned to pay the said sum of $713.75. *Held*, on demurrer that the demand for an account was not warranted by the allegations of the decla-

ration, and was not the proper remedy for the cause of complain therein stated.

Semble, a party suing another to account in a partnership matter, is not obliged to tender an account or to declare that he has none to give. *Michaud & Vezina.* Judgment confirming, 7 Decr. 1880. Sir A.A. Dorion, C. J.. Monk, Ramsay, Cross, JJ. Rep. 6 Q. L. R., 353.

Lorsqu'un associé poursuit un autre associé en reddition de compte, il n'est pas obligé d'alléguer qu'il a lui-même rendu compte, ou qu'il n'en a pas à rendre, il lui suffit d'alléguer que le défendeur a en sa possession des biens ou sommes de deniers appartenant à la société qui a existé entre eux, dont il n'a pas rendu compte.

A défaut par le défendeur de rendre compte dans le délai fixé par le jugement qui lui a ordonné de rendre compte, le demandeur peut procéder à établir lui-même un compte d'après l'article 533 du Code de Procédure Civile, ou il peut, suivant la pratique suivie avant le Code, faire condamner le défendeur à lui payer soit une ou plusieurs provisions jusqu'à ce qu'il lui ait rendu compte, soit une somme définitive pour tenir lieu du reliquat de compte, à la discrétion de la Cour. *Gauthier & Roy*, Q. Judgment refusing motion for leave to appeal. 7 Dec. 1880, Sir A. A. Dorion, C.J., Monk, Ramsay, Cross, Baby, J. J. Rep. 1 Dec. d'A., 149. 10 Rev. Iég. 443. *Bourgoin & Plante*, M., Judgment reversing, 22 March 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Leg. News, 461.

In this case there was an incidental demand, the Court below dismissed the principal demand with costs, and maintained the incidental demand for $37.50 with costs in an action for that amount. This Court thought both actions should have been dismissed, as nothing was due to one or other party, each party paying his own costs in both cases in the Court below, and costs of this appeal, and each half of the costs of the expertise.

A party cannot, by motion, obtain delay to answer an action *en reformation de compte* until a book is produced by Plaintiff, the existence of which Plaintiff deny. *Les Commissaires d'écoles de Notre Dame de Portneuf & Fournier*, Q. Judgment reversing, 7 Dec. 1882. Sir A. A. Dorion, C.J., Monk, Ramsay, Cross, Baby, JJ.

A woman *commune en biens* with her late husband, and *légataire universelle en usufruit* may bring an action against the partner of her late husband for an account of the partnership, without calling in the *nu-propriétaires*. *Gingras & Dignan*, Q. Judgment confirming, 5 Dec. 1878, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Appellant sued Respondent for an account of a raft sold for him by Respondent, who answered, that he had no account to render, as the raft belonged to one Bannerman to whom he had accounted, and that he owed nothing. Appellant's pretention is that the receipt he gave Respondent for an advance, was in these words: "Please hold, subject to the order of Messrs. Ross & Co., *my* raft now lying at your cove and oblige." Signed: "John Doran." If this stood alone, it would be conclusive, but the whole transtion is proved. It is established that whatever was the nature of the transactions between Bannerman and Doran, Ross knew no one but Bannerman, and that the money was given to Ross on Bannerman's credit, and there can be no doubt Ross understood the raft was Bannerman's, and that Doran left him for two years under that impression, during which time Ross settled with Bannerman, without any knowledge of Doran's claim to the raft. The word *my* raft, in the ordinary language of the people, does not necessarily imply property, but possession. (1) *Doran & Ross*, Q. Judgment confirming, 5 Oct. 1883, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

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(1) NOTE.—The Supreme Court reversed the decisions of the two courts.

A judgment to account within thirty days does not become executory *de plano* by the lapse of the thirty days. *Le curé de Beauharnois & Robillard*, M. Judgment confirming, 21 June, 1879. Sir A. A. Do ion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk and Tessier, JJ., dis. Rep. 2 Leg. News, 236.

The Appellants by deed of donation gave to the Respondent, their mother, five pieces of property, subject to the charge of paying hypothecs to the amount of $5000, and to the Appellants a *rente viagère* of $288. This continued till the 2nd February, 1881, when, by another deed the donation was annulled. Respondent rendered an account of the administration of their property, which they accepted "*se réservant le droit de vérifier le compte des recettes, alors à celles produit par l'Intimé et de réclamer de ce dernier à demande le montant de toute erreur ou omission en leur faveur.*" The Appellant brought an action for debt and *en réformation de compte. Held* by the Superior Court, that Respondent was not the mandatory of Appellants when he rendered the account, and owed them no account, and that therefore an action *en réformation de compte* did not lie against him. On the facts that the Defendant had given Appellants an hypothec exceeding what was due them. *Darveau et al, & Darveau*, Q. Judgment confirming, 8 May, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ., Ramsay, Cross, JJ., were of opinion that Appellants were entitled to have the account between them and the Respondent reformed, as it was the basis of their rights.

Lorsqu'un défendeur poursuivi pour un état de compte de la gestion d'un immeuble et pour une somme réclamée sur la vente de cet immeuble, en vertu d'une convention spéciale, plaide au premier chef de l'action qu'il n'a jamais été mis en demeure de rendre compte, mais qu'il a toujours été prêt à le faire, et produit son compte avec le plaidoyer; et plaide au second chef de l'action, qu'il ne doit rien au demandeur en vertu de la convention alléguée; le compte accompagnant le plaidoyer ne sera pas rejeté sur motion comme ayant été produit irrégulièrement et prématurément.

Un tel compte ne peut pas être rejeté sur motion avant l'enquête parce que le chapitre des dépenses contient des items qui ne paraissent avoir aucune connexité avec la gestion de la propriété dont on demande compte: Cette question ne pouvant être discutée et décidée que sur un débat de compte. *Dorion & Dorion*, M. Judgment reversing, 26 November, 1884, Sir A. A. Dorion, C. J. Ramsay, Tessier, Cross, Baby, JJ. Reported M. L. R. I. Q. B. 65, 7 Leg. News, 397.

Les parties ayant lié contestation sur le mérite du compte rendu, il n'y a plus lieu à se plaindre des défauts de forme du dit compte. *Lamarche & L'Heureux*, Q. Judgment reversing, 8 October, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ., Rep. 11 Q. L. R., 342.

ACCOUNTANT.—Is a person skilled in keeping accounts. "In matters where accounts have to be rendered or adjusted, or which require calculations to be made, and in matters of separation of property, or partition of community or succession, the Court may refer the case to one or more persons skilled in such matters;" C. C. P. 340. *v.* EXPERTS.

ACQUIESCENCE.—In its widest sense acquiescence is any adhesion of a person to a thing done. It seems, however, it is only usual to apply it to certain contracts which expressly recognize a state of things as binding. Technically, therefore, it is for the most part applied to an implied assent. The liability to be incurred by acquiescence can only be established by such proof as would establish an obligation for a like matter. An acquiescence which would have the effect of resiliating another contract or creating a new obligation, can only be proved as a contract can be proved. But a right may sometimes be lost by acquiescence in a state of things

incompatible with the continued existence of such right. Pleading over to the merits of an action, is such an *acquiescement* in a judgment dismissing an *exception à la forme* that leave to appeal will be refused. *Coté vs. McGreevy*, Q. Judgment 7 Sept., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Acquiescence covers irregularities of procedure. *Beauchamp & Letourneau*, M. Judgment confirming, 27 Nov. 1884, Monk, Ramsay, Tessier, Cross, Baby, JJ.

A party who pays the amount of judgment, without special protest, after his arrest and while in prison, will not be held by such payment to have acquiesced in the judgment, so as to take away his right of appeal, particularly where he had given instructions to institute appeal. *Ouimet & Lafond*, M. Judgment, March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

And where an action was brought to have an assessment roll to defray the cost of an improvement declared null and void, and, after the institution of the action, Plaintiff had paid the amount for which he was assessed, in order to be relieved from an execution which had issued against his effects, such payment was not an abandonment of his right to have the roll declared null and void as far as he was concerned, for he paid under compulsion, and did not acquiesce. *Bisson & The City of Montreal.* M. Judgment reversing, 22 Sept., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Tessier, J., dis. Rep. 25 J. 306, 10 Rev. Lég. 100, 2 Leg. News 341.

Proof of acquiescence in judgment appealed from will be ordered in appeal *Jordan & Jetté*, M., judgment ordering proof. M. September, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a petition has been filed praying the dismissal of an appeal on the ground of acquiescence, and affidavits are filed in support and against the application of a contradictory character, leave will be granted to cross-examine the deponents. *Hotte & Champagne*, M., Judgment, 19 November, 1882. Sir A. A. Dorion, C. J, Monk, Ramsay, Cross, Baby, JJ., Rep. 25 J. 227, 2 Dec. d'A. 127.

Where there were irregularities in the proceedings of arbitrators, and one of the parties to the submission took advantage of the award, knowing of these irregularities, he will be held to have acquiesced in the proceedings. *Lepine & Fiset.* Q. Judgment confirming, 8 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, J J. Rep. 10 Rev. Leg. 153.

And although an appeal cannot be brought in the name of a dead person, if the representatives have come in and taken up the *instance*, without objection, the irregularity will be covered. *Hagarty & Morris*, M. Judgment, 21 Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 9 J. 103.

Where a person by error takes more stock in a joint stock company than he intended, and had sought to be relieved of the subscription immediately after, but on persuasion took no further steps, and afterwards received a dividend on the whole stock, he will be held to have acquiesced in the subscription. *Coté & Standard Insurance Company*, Q. Judgment confirming, 8 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep. 6 Q. L. R. 147, 10 Rev. Leg. 289. Reversed in Supreme Court. 6 S. C. R. 193.

Where a building society has contracted under legislation by the Parliament of Canada, it will not be allowed to repudiate its obligations under pretext that the act of Parliament was beyond the legislative powers of Parliament. *La Cie. de Villas du Cap Gibraltar & Hughes*, M. Judgment confirming, 2 March, 1883. Monk, Ramsay, Tessier, Cross, Baby, JJ., Cross, J., dis. Rep. 3 Dec. d'A. 175. Confirmed in the Supreme Court.

ACTION.—Is used in law to designate the legal proceedings taken by the plaintiff to assert a right. Hence it is frequently employed for the whole suit at law.

§1. WHO MAY SUE.
§2. RIGHT OF ACTION.
§3. RES JUDICATA.
§4. LITISPENDENCE.
§5. DISCONTINUANCE.
§6. WHO MAY BE SUED.
§7. WHEN ACTION MAY BE BROUGHT.
§8. ACTIONS ARE OF THREE KINDS. PERSONAL—REAL—MIXED.
§9. WHERE ACTION MAY BE BROUGHT.
§10. CUMULATION OF ACTIONS.
§11. MISCELLANEOUS.

§1. WHO MAY SUE.—1. "No person can bring a suit at law unless he has an interest therein." C. C. P. 13. This is inexact. Neither Prevot de la Jannes nor Pigeau says anything of the kind. "*Le fondement de toute action c'est le droit;*" and he who sues without such right will be declared *non recevable.* "*Ces causes (de non recevoir, sont pour l'ordinaire, ou qu'il n'a point d'intérêt, ou qu'il n'a point de qualité, ou l'un et l'autre ensemble.*"

"No person can be party to a suit who has not the free exercise of his rights, save where special provisions apply. Those who have not the free exercise of their rights must be represented, assisted or authorized in the manner prescribed by the laws which regulate their particular status or capacity." C. C. P. 14.

"No person can use the name of another to plead, except the Crown through its recognized officers." C. C. P. 18. And probably now the local legislature of the Province of Quebec, as exercising sovereign powers. "Tutors, curators and others representing those who have not the free exercise of their rights, plead in their own name in their respective qualities" C. C. P. 19. If the powers of a judicial adviser be not defined by the judgment, the person to whom he is appointed is prohibited from pleading without the assistance of such adviser. C. C. 351.

A tutor sues *es qualité* for his minor. *Poissant & Burrette.* M. Judgment confirming, 17 Dec., 1879. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 12.

A curator to a vacant estate only represents the succession of the deceased, and he cannot bring action to set aside a deed made by him, alleging fraud, for the estate has no lawful interest to set that up. *Lamarche & Pauzé.* M. Judgment reversing, 31 Oct. 1883, Sir A. A. Dorion C. J., Monk. Ramsay, Tessier, Baby JJ. Rep. 3 Dec. d'A. 265.

§2. RIGHT OF ACTION.—A person having no interest in a suit is *non recevable* in his demand. This is what is meant by art. 13 C. C. P. (1)

In a general sense it may be said that "right of action" is co-extensive with interest. *Hood & The Bank of Toronto.* M. Judgment confirming, 19 June. 1880. Sir A. A. Dorion C. J., Monk, Ramsay, Ross, JJ. Rep. 3 Leg. News 234.

Campbell gave a mortgage for $25,000 to Lucy Jane Stevens, his wife, for the price of the stock-in-trade belonging to her in a partnership which had existed between her and one Charles Hagar, including from $10,000 to $11,000 interest on said price. Campbell, subsequently gave a mortgage on the same property, for $15,000 to Walter Bonnell, which mortgage, Bonnell transferred to the Appellant as collateral security for a note of $26,000, discounted on the same day, the bank receiving at the same time other collaterals to secure the payment of the note. Campbell subsequently gave a mortgage to Brackley Shaw for $45,000.

Lucy Jane Stevens became a party to the deed, and granted to Shaw a priority of hypothec over her own.

The action is by the Appellants as creditors under the transfer of the hypothec from Bonnell, to set aside and

(1) NOTE—It is difficult to see in what this differs from sec. 1 in which the author objects to the statement of art. 13 C. C. P. Ed.

annul, as illegal and void, the hypothec by Campbell to his wife, and the priority given by the latter to Shaw.

As the Appellant had been paid the full amount of the note of $26,000 for which the hypothec of $15,000 had been transferred as collateral security only, the Appellant had no interest to contest the hypothec given by Campbell to his wife, and the priority given by the latter to Shaw.

The wife and children of a man, who, by his father's will, inherited real estate substituted to his children, to procure him aliments, and which was by the will declared to be *insaisissable*, cannot intervene in the proceedings in execution of a judgment by which the revenues of such real estate were seized, *Molson & Carter*. M. Judgment confirming, 24 March, 1883, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, Cross, JJ., dis.

But the husband can, in his own name, set up the conditions of the will to defeat the recourse of the creditor, to whom he has hypothecated the property as being his own. *Holmes & Carter*, M. Judgment reversing, 24 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ., Ramsay, J., dis. Rep. 6 Leg. News 372, 3 Dec. d'A. 279.

The mother of an illegitimate child may sue for the expenses of seduction for aliments for the child, and *en déclaration de paternité*. *Kingsborough & Pound*, Q. Judgment confirming, 5 March, 1878, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Q. L. R., 11, 1 Leg. News, 115.

A notary, who has been a witness on the *inscription en faux* of his own act, and in his deposition declared he had no interest in the issue, has a right to intervene and carry on an appeal in his own name, from the judgment declaring his act *faux*. (1) *Defoy & Forté*, M. Judgment, 20 Dec. 1879, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 3 Leg. News, 36.

(1) NOTE.—Query as to the effect of his testimony.

A. acting for B., his undiscovered principal, sold to C. a cargo of coal to arrive, C. to have the option of taking the coal at the weight given in the bill of lading or of having it re-weighed at seller's expense. C. accepted the coal without re-weighing, but afterwards weighed it in his own yard, without notice to the seller, and mixed it with other coal. *Held*, that B. the undiscovered principal, might sue on the contract in his own name. That C., by tendering in his second plea the price of the coal admitted to have been received, aknowledged that the action had been properly brought by B. *The Canada Shipping Co. & The Victor Hudon Cotton Co.*. M. Judgment reversing, 24 March 1882, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. The Chief Justice and Ramsay, J., dis. Rep. 5 Leg. News. 302, 2 Dec. d'A., 356.

And the interest must create a *lien de droit*. So where two butchers make a contract by which one cedes to the other a contract he has to supply meat, and such contract is terminable at the will of the party to be supplied, no action will lie against the cedant if the contract is terminated by the party to be supplied. *Bayard & Versailles*, M. Judgment confirming. Dec. 1875, Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

The *moyens* which would support a *Requête Civile* will support an independent action to set aside the judgment improperly obtained. *Kellond & Reid*, M. Judgment reversing. 20 June, 1874. Taschereau, Ramsay, Sanborn and Loranger, JJ. Rep. 18 J., 309.

To give right of action the interest must be lawful. So, it seems, that a contract by which two butchers agree that they will not supply a certain party with meat is illicit, and no action will lie by the one against the other who breaks the contract. *Bayard & Versailles*, M. Judgment confirming, December, 1875, Dorion, C. J., Monk, Ramsay, Sanborn JJ.

Where appellant agreed with Respondent that she should not bid at an

auction sale of property, on which Respondent had a claim, and that Appellant would pay Respondent; the agreement was held to be binding because there was a lawful consideration. *Beaudette & Mahoney*, Q. Judgment confirming, 6 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 5 Q. L. R. 165.

But where false bidders are employed at an auction sale to enhance the price, and they bid, the purchaser will not be held liable to carry out the sale, *Jetté et al. & McNaughton*, M. Judgment confirming, 22 Sep. 1876, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. The Chief Justice and Sanborn J. dis. Rep. 20 J. 255.

Two actions will not lie between the same parties for the same matter, for the Defendant will either have the exception of *res judicata* or of *litispendence.*

§ 3. RES JUDICATA creates a presumption *juris et de jure.* It applies only to that which has been the object of the adjudication, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon. C. C. 1241.

An action of damages will not lie against a party to a previous suit by his adversary, for an alleged false affidavit by which such party obtained a final judgment in his favour in the previous suit. The first judgment is *res judicata Boisclair & Lalancette*, M. Judgment reversing, 15 Feb. 1881, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Rep. 5 Leg. News 266, 1 Dec. d'A. 289.

§ 4. LITISPENDENCE.—An action on a promissory note withdrawn subject to costs. New action on same note, transferred to another, without payment of costs, plea of litispendence. *Held* plea bad. *Martin & St. Pierre* Q. Judgment reversing, 7 Oct. 1882. Sir A. A. Dorion C. J, Ramsay, Tessier, Cross, Baby, JJ.

§ 5. DISCONTINUANCE. — A party may, at any time before judgment discontinue his suit or proceeding on payment of costs. C. C. P. 450.

Discontinuance replaces matters as of course in the state in which they would have been, had the suit or proceeding not been commenced. C. C. P. 452.

But a party who has affected a discontinuance cannot begin again unless he previously pays the costs incurred by the opposite party upon the suit or proceeding discontinued. C. C. P. 453.

§6. WHO MAY BE SUED —All persons are liable to suit to compel them to execute their legal obligations, except when the right of action is expressly taken away. Those who cannot bind themselves cannot *ester en jugement* alone, and they must be represented, assisted or authorized in the manner prescribed by the laws which regulate their particular status or capacity. C. C. P. 14.

§ 7. WHEN ACTION MAY BE BROUGHT.—Generally an action may be brought when the right arises. But when there is a condition precedent unfulfilled the action cannot be brought. So where a public officer is sued for damages for acts done in the performance of his official duties, no action will lie until he has received due notice of the action. *Grant & Beaudry.* M. Judgment confirming, 18 Nov. 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 393, 2 Dec. d'A. 197, *v.* INSURANCE CASES.

But a creditor may, before the fulfilment of the condition do all acts conservatory of his rights. C. C. 1086.

§ 8. WHERE ACTION MAY BE BROUGHT.—"In matters purely personal, other than those mentioned in articles 35, 36, 38, 40 and 42, the defendant may be summoned either—1, before the court of his domicile; 2, before the court of the place where the demand is served upon him personally; or 3, before the court of the place where the right of action originated. C. C. P. 34—In every real

or mixed action the defendant may be summoned before the court of his domicile or before that of the place where the object in dispute is situated. C. C. P. 37.—In matters purely personal if there are several defendants in the same suit, residing in different jurisdictions, they may all be brought before the court of the jurisdiction where one of them has been summoned in conformity with article 34. In real actions they should all be summoned before the court of the place where the object in dispute is situated. In mixed actions, before the court of the place where the object in dispute is situated, or before the court of the domicile of one of the defendants. C. C. P. 38.—When a real action has for its objet an immoveable or immoveables, situated partly in one district or circuit, and partly in another the suit may be brought in either." C. C. P. 41.

§9 THREE KINDS OF ACTIONS.—There are three kinds of actions personal, real and mixed.

Personal.—A subscriber to stock, in a joint stock company, having its place of business in Montreal, and who subscribed for the stock at his domicile in another district, cannot be summoned, on an action for calls, to appear in the District of Montreal, by service upon him at his domicile. The *National Insurance Company & Paige.* M. Judgment confirming, 4 Feb. 1879. Sir A. A. Dorion C. J. Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 187, 2 Leg. News 93.

A passenger took a ticket for a berth in a sleeping car from the province line to Montreal, from a company whose principal place of business is in a foreign country. *Held* that the service at the office of the company, where tickets were sold in Montreal, to appear in Montreal, was a sufficient service to give the Court at Montreal jurisdiction. *New York Central Sleeping Car Co. & Donovan.* M. Judgment confirming May, 1882.

A policy of Insurance was made in Montreal, with a company having its chief place of business there to insure property situate in Quebec, where the preliminary contract was made and where the company had an office and an agent; but the service was made in Montreal. *Held* that an action for the amount of the Insurance, the building having been destroyed by fire, may be brought in the District of Quebec. *The Scottish Com. Ins. Co. & O'Malley.* Judgment confirming 7 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ., Cross J., dis.

NOTE.—The judgment of the Superior Court was as follows: "Considérant "qu'il est allégué dans la déclaration "du demandeur et qu'il est en preuve "au dossier que la police d'assurance "sur laquelle la présente action est ba- "sée, quoique datée à Montréal, a été "remise au demandeur, à Québec, par "l'agent de la défenderesse, en vertu "de conventions précédemment faites "à Québec, au bureau de la dite défen- "deresse, par son dit agent, et qu'en "conséquence, le droit d'action a pris "naissance à Québec, et vu que le "montant dû en vertu de la dite police "est payable à Québec, renvoie la dite "exception déclinatoire avec dépens."

Action was for damages for a malicious accusation at Montreal, and setting forth as grounds for damages as well the accusation as the illegal arrest, the Plaintiff being arrested in the district of Iberville, the Defendant having his domicile in the district of Bedford. The action was taken out in the district of Montreal, where the Defendant was summoned to appear the summons being served at the domicile of Defendant; *held*, that there was no jurisdiction in the Court at Montreal, the whole cause of action not having arisen in Montreal. *Bolduc & Archambault.* M. Judgment reversing, 24 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ., Ramsay, J., dissenting thought the whole cause of action did not mean all that goes to give a right of action but the proximate and principal cause of action. Rep. 2 Dec. d'A. 110.

§ 10. CUMULATION OF ACTIONS. — Several causes of action may be joined in

the same suit, provided they are not incompatible, or contradictory. that they seek condemnations of a like nature, that their joinder is not prohibited by some express provision of law, and that they are susceptible of the same mode of trial. C. C. P. 15.

So it is not an improper joinder of actions to charge one of the Defendants accused of participation in fraud with the other Defendants, although it appears part of the conclusions do not affect him, if the whole matter be to some extent connected. *McCulloch & Griffin.* M. Judgment confirming, June, 1874. Dorion, C. J., Taschereau, Sanborn and Loranger, JJ., Ramsay, J., dis., as to the misjoinder of conclusions as regards Defendant in the particular case.

And the directors of a joint-stock company, incorporated under cap. 63 C. S. C. may be sued with the company for a debt due to Plaintiff if they have neglected to make the return required by the 13th section 13 and 14 Vic., c. 28. *The Henderson Lumber Company & Ward.* Judgment confirming 7 Sep., 1874. Monk, Taschereau, Ramsay, Sanborn, JJ.

And an action *en déclaration de paternité* and for aliments for the child may be joined to a demand by the mother for damages arising from the seduction, the grounds of action being neither incompatible nor contradictory. *Kingsborough & Pownd,* Q. Judgment confirming, 5 March, 1875. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Q. L. R. 11, 1 Leg. News 115.

An action on an account for less than $200 and an action for rent may be joined. *Mullin and The Grey's Creek Dairy Co., et al.* M Judgment reversing. September, 1876. Sir A. A. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Freight and $60 damages, owing to illegal seizure of Plaintiff's barge, may be brought in and by the same action. *Dufresne et al., & Bergeron.* Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn JJ., Monk J. Dis.

§ 11. MISCELLANEOUS.—Motion to suspend this action until another action is decided refused. *Directors of St. Bridget's Asylun & Arnoldi.* Judgment Dec. 1878.

This is a motion by the Defendants to suspend the proceedings in this cause until the decision of the issues in the cause of *Arnoldi et al,* against *Tiffin et al.* It is alleged that in the last named suit the Defendants seek to set aside or modify the Deeds invoked by the Plaintiffs in this suit. The declaration in the suit of *Arnoldi et al* against *Tiffin et al,* is produced and shows in effect, that the representatives of the late Mr. Furniss are questioning the acts invoked in this case, and there can be very little doubt that they have a right to urge their pretentions in answer to the Plaintiffs; but the question is, whether they have sought the right remedy. There seems to be no question that at an earlier stage of this case he might have obtained leave to call on the parties to this Deed to come into this suit to hear the Deeds declared null. But he never sought this permission. He took out a new action and sometime afterwards he asked leave to re-unite the later case to this one. Leave was refused both by the Court below and here. Defendants now wish this case to be suspended till the other is decided. I think there is no ground for such a proceeding.

Where motion for leave to appeal being served on Respondant, he filed a renunciation to the judgment in his favour, leave to appeal was refused on Respondent paying costs. *Bellay & Guay.* Q. Judgment 1 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn JJ. Rep. 4 Q. L. R., 91. v. ACCOUNT—ASSUMPSIT—BORNAGE—DAMAGES—DECLARATORY ACTION—HYPOTHECARY ACTION—JUDGMENT—NEGATORY ACTION—PETITORY ACTION—POSSESSORY ACTION—QUI TAM ACTION—REVOCATORY ACTION—TITRE NOUVELLE.

ADJUDICATAIRE.—The *adjudicataire* is the purchaser at an auction sale.

The *adjudicataire* cannot be subjected to more stringent conditions or to greater obligations than those contained in the *cahier de charges. Comte & Archambault*, M. Judgment reversing, 16 June, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 102.

An *adjudicataire* who has not been able to obtain a title to the real estate adjudged to him, owing to the judgment of distribution not being rendered and this not by any laches on his part, may, within a year of rendering such judgment, obtain a writ of possession authorizing him to put the *adjudicataire* in possession; and the Defendant, will not be maintained in his pretention that he has been in open and peaceble and public possession of the said immoveable for more than a year and a day, prior to the demand of possession. *Burke & Langlois*, Q. Judgment confirming, 5 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 560, 2 Leg. News, 202.

ADMISSION.—In the sense admission is used in the Codes, it signifies the allowance of the truth of some fact in issue; analagous to confession. The French word is *aveu* (C. N. 1354.) for which "confession" is used as a synonym. Merlin, "Aveu," "Confession."

Admissions are extra-judicial or judicial. They cannot be divided against the party making them. C. C. 1243.

The answer of any party to a question put to him may be divided in the following cases and according to the discretion of the Court: 1o. When it contains facts which are foreign to the issue: 2o. When the part of the answer objected to is improbable or invalidated by indications of fraud or of bad faith or by contrary evidence. 3o. When the facts contained in the answers have no connection with each other. 231 C. C. P.

No particular form of words is required in any pleading; but every fact, the existence or truth of which is not expressly denied or declared to be unknown is held to be admitted. C. C. P. 144.

Judicial admissions cannot be divided against the party making them. *O'Brien & Thomas*, M. Judgment confirming, 16 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 43.

An admission, whether judicial or extra-judicial, cannot be divided, so as to make proof by a part thereof against the party making such admission. *Sauvé & al vs. Denis.* M. Judgment confirming. 3 Feb., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 308. 3 Leg. News, 75.

Where a party sued for a sum of money pleads a general denial, and on examination admits that he borrowed the money and could not say when it was paid back, and on cross-examination of his own counsel said he paid it on the 2nd May before the institution of the action, the Court may take the one statement and leave the other and this is not the division contemplated by the code. *Cotnoir & Parenteau.* M. Judgment confirming, 15 June, 1880, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 213.

Where a party, by a letter, refuses to receive delivery of goods, giving as a pretext, the failure to conform to the conditions of the contract, such letter furnishes a *commencement de preuve par écrit* and enables plaintiff to establish his case by parol. *Lamont & Ronayne & al.* M. Judgment confirming, 15 Sept., 1874, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn JJ.

On an action for the price of a horse, the Defendant admitted that he had got the horse but that it was on trial, and that he gave his check for the price, but that it was only as a guarantee that he would bring the horse back, without determining whether or not this was a commercial transaction, the answers of Defendant furnish a

commencement de preuve par écrit. Cox & Patton. M. Judgment reversing, 20 June, 1874. Taschereau Ramsay, Sanborn, Loranger JJ., Loranger, J., dis. Rep. 18 J., 316.

Where a proprietor, examined under oath as a witness, admits having ordered work beyond that is mentioned in the contract and specification, and for which no authority in writing has been given. the value of such work may be recovered, notwithstanding article 1690 C. C. *Beckham & Farmer.* M. Judgment reversing, 29 Jan. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 261. 1 Leg. News 115.

Interrogatories on *faits et articles* taken *pro confessis* imply an admission. and when sufficient, may supply the want of a memorandum in writing required by 1235 of the Civil Code. *Douglas & al. vs. Ritchie & al.* M. Judgment reversing 20 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ., Taschereau, J., dis.

The admission by the heir and executors of a party deceased that he had ordered and paid for two casks of beer used by guests at an election feast is not a *commencement de preuve* to admit verbal evidence that the deceased had ordered the feast and agreed to pay for it, *Guevremont & Tunstall & al.* M. Judgment 22 Sep., 1876. Sir A. A. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J., 293.

The principal is not bound by the admission of an agent after his agency has terminated. *Pinsonneault & Desjardins* M. Judgment reversing, 17 Dec., 1879. Sir A. A. Dorion C. J., Ramsay, Tessier, Cross, Routhier, JJ. Rep. 3 Leg. News 29. 24 J. 100.

Dans une action pour faire annuler un rôle de cotisation il n'est pas nécessaire que le rôle soit produit, si les irrégularités peuvent être constatées par les admissions de la partie adverse. *Bisson & The City of Montreal.* M. Judgment reversing, 22 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ., Tessier J., dis. Rep. 10 Rev. Leg. 100. And also in a case of *Baylis & The City of Montreal.* M. Judgment reversing, 22 Sep. 1879. Same judges, Tessier, J. dis. Rep. 2 Leg. News 340. 23 J. 301. 10 Rev. Leg. 106.

A pleading, or part of a pleading, cannot be abandoned in order to get rid of an admission. *Lasalle & Hart,* Q. Judgment reversing, 6 Sep. 1877, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

Article 144, C. C. P. does not imply that when a party is in default to answer or reply to an affirmative plea, he admits what it contains; but only that when he answers such plea, and fails expressly to deny the existence of a fact alleged, he is held to admit it. *Beaulieu et al., & Therrien,* Q. Judgment reversing, 4 Dec., 1883, Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ.

On a trial for perjury, the admission of evidence of extra judicial confessions, prisoner's sister tending to prove fraud concerted between prisoner and his sister, was illegal, and verdict set aside. *Reg. vs. Guay,* Q. Judgment, 7 Sep., 1874, Dorion, C. J., Taschereau, Ramsay, Sanborn, JJ. Rep. 18 J. 306.

ADVENTURE (JOINT).—A joint adventure is a particular partnership contracted for a single enterprise, C.C., 1862.

ADVERTISEMENT IN NEWSPAPER.—*The St-Lawrence Steam Nav. Co. & McNamee,* M. Judgment reversing, 20 Sep. 1882, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

ADVOCATE AND ATTORNEY. — The profession of advocate and attorney is regulated by the provisions contained in an act intituled: An act respecting the Bar of the Province of Quebec," 44 and 45 Vict., c. 27, which repeals the "Act respecting the Bar of Lower Canada" mentioned in Art. 1732 C. C. and by an act to amend the Act 44 and 45 Vic., c. 27, 47 Vict., c. 32. For the history of the bar in the Province of Quebec, see de Montigny, "Histoire du droit Canadien" p. 575.

By the law of France, the advocate has a claim for remuneration for his services. The disciplinary rules of the bar of Paris forbade the institution of such an action. Here no such rules prevail, and the action may be brought either on an express or an implied contract. Where brought on an implied contract, and for the appreciable value of the services, the fact that the services were rendered to another advocate, who also took part in the proceedings on his own behalf, will tend to repel the idea that a contract was implied. This presumption will further be strengthened by the fact that the Plaintiff proceeded to a second jury trial without any demand of fee for the first trial,—the two trials taking place at a considerable distance of time one from the other. *Amyot & Gugy*, Q Judgment confirming, 8 Sep., 1876, Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 2 Q. L. R. 201.

An attorney, one of a firm, both of whose partners have left practice, one becoming a judge, and the other police-magistrate, cannot invoke Art. 1854, C. C., with regard to a settlement of old business of the firm, although there was no formal substitution.

The receipts of witnesses who have no claim against the client for their fees, will not entitle the attorney to charge them against his client.

The item for a retainer, when not stipulated, rests on an implied contract. *Ouimet & Bergevin*. M. Judgment confirming, 29 Jan. 1878, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 265, 1 Leg. News 118.

A special bargain between the attorney and his client is binding. *Holton & Anderson*, Judgment, 1876, Monk, Ramsay, Sanborn, Tessier, JJ.

In the absence of a special agreement, an advocate, acting as attorney of record, cannot recover from his client more than the tariff fees, though he may have performed services not adequately previded for by the tariff, and

for which the client promised to pay something extra. *LaRue & Loranger*, M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J. dis. Rep. 3 Leg. News, 284.

An attorney for legal business is a *mandataire*, and like all agents his services may he dispensed with at any time by the principal, saving his rights. So if an attorney be retained by a general retainer and at a fixed rate and for a fixed period, and if his services are dispensed with before the expiration of that period he is entitled to payment for his services to the end of the period fixed.

And where part of his remuneration consists in the fees in cases in which he shall be successful, he is entitled to those fees in cases then unfinished, and he cannot be made to wait for the issue of the suit for payment. The presumption as against the party is that he is right in his pretentions and that he will therefore gain in the suit; and under any circumstances the attorney cannot be held responsible for the issue over which he is no longer to have control.

That such an attorney may recover extra pay for services rendered by him in expropriations for a park for the client, because these were not strictly speaking professional services. *Devlin & The City of Montreal and E. Contra*, M. Judgment 13 March, 1878. Dorion, C. J., Monk, Tessier, E. Taschereau, JJ., Ramsay, J, concurred as to the two first rulings, but dissented as to the last, and *held*, that if the services of Respondent were professional, they were covered by the general retainer. If they were not, then he should have established a contract.

Les intimés ayant réclamé de l'appelante une somme de $508, pour honoraires et déboursés dans des causes dans lesquelles ils avaient occupé pour elle en leur qualité d avocats et procureurs. *Jugé*:—Confirmant le jugement de la Cour de première instance; 1o. Que les intimés ont été autorisés par l'agent de l'Appelante à intenter

les actions pour lesquelles ils réclament maintenant les frais 2o. Que pour priver un avocat de ses honoraires, il faut prouver qu'il a agi avec fraude ou avec une ignorance grossière des devoirs de sa profession. 3o. Que l'article 1107, C. P. C., permet de porter l'action pétitoire ou l'action possessoire devant la Cour de circuit contre toute personne qui détient illégalement des terres tenues en franc et commun soccage, mais sans aucun préjudice à la juridiction de la Cour Supérieure, et que les intimés, qui, sans instructions spéciales, ont porté les actions devant la Cour Supérieure, ne doivent pas être pour cela privés de leurs honoraires et déboursés, surtout lorsque la Cour de première instance les leur a accordés. *Davidson & Laurier et al*, Q. Judgment confirming, 6 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 366

AFFIDAVIT.— A declaration in writing under oath.

An application to take an affidavit, in support of a petition for a writ of *Habeas Corpus*, setting forth that the facts alleged in the petition were true so far as the party to be sworn knows, will be refused, such an affidavit being of no value, as it declares nothing relating to the matter in question. *Exp. McCarthey*, M. In Chambers, 26 Feb. 1875. Ramsay, J., *v.* CAPIAS.

AFFREIGHTMENT.—Contracts of affreightment are either by charter party, or for the conveyance of goods in a general ship," 2407 C. C. Charter-party, 2414 C. C. Bill of lading, 2420 C. C.

AGENCY.— *Vide* MANDATE.

AGENT.— *Vide* MANDATE.

ALIMENTARY PENSION. — Is the allowance granted to one in want, by another or others obliged by law to maintain him. *v.* ALIMENTS—MAINTENANCE.

ALIMENTS.—"*On entend par ce mot, la nourriture et les autres choses nécessaires à la vie, comme l'habitation, les vêtements. On donne le même nom aux deniers accordés pour tenir lieu de ces choses.*" Merlin. The English version of the Code has adopted the word "maintenance" as an equivalent. C. C. 169 and 170. In the civil law as adopted in Scotland, the word "aliment" is used to signify "a fund of maintenance." Law Dict. In English law "alimony" is the allowance to the wife out of the estate of the husband from whom she is separated. Aliments in English, strictly speaking, means nourishment, food. Perhaps it would have been no great violation of linguistic propriety, if the Code, copying the terminology of the French and Scotch law, had extended the meaning from the thing to what would produce it. But if it was thought necessary to be original, sustenance or sustentation would have been preferable. The word "maintenance" in our law, already designates a misdemeanour. *v.* MAINTENANCE.

ALTERNATIVE OBLIGATION.—*v.* OBLIGATION—PLEADING AND PRACTICE.

AMEUBLISSEMENTS. —*v.* MOBILIZATION.

AMIABLE COMPOSITEUR.—"*Amiable compositeur (ou arbitrateur), est celui qui est élu par les parties pour terminer leur différend à l'amiable, selon l'enquête, sans être tenu de garder exactement les formalités de justice, et la vigueur de droit.*" Ferrière *v.* ARBITRATEUR —ARBITRATION.

The quality of *amiable compositeur* does not permit the referees to enlarge the scope of the matters submitted to them. *Daigle & Sevigny.* Q. Judgment 4 June, 1875. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

ANIMALS LOST AT SEA.—*v.* FREIGHT.

APPEAL.—TO THE COURT OF Q. B.—

General provisions.

§ 1. WHO MAY APPEAL.
§ 2. AUTHORISATION.
§ 3. ENQUETE IN APPEAL.
§ 4. APPEAL REJECTED ON MOTION.
§ 5. EVIDENCE.
§ 6. MISCELLANEOUS.

§ 1. *Who may appeal.* Generally those who have an interest may appeal; even those not parties to the suit may intervene to prosecute the appeal And so a notary whose minute is attacked *en faux*, and who has been examined as a witness on the inscription *en faux*, and declared he had no interest in the suit, will be allowed to intervene in order to appeal from the judgment declaring his deed to be *faux*. *Defoy & Forté.* M. Judgment confirming, 20 Dec., 1879. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 3 Leg. News 36.

The party who made default may appeal.

And an appeal may be instituted by an interim assignee. *Major & al. & Chadwick.* M. September, 1875. Dorion C. J., Monk, Taschereau. Ramsay, Sanborn JJ.

Appeal will not lie in the name of a person deceased; and if objected to, the heirs will not be allowed to take up the instance. *Kirby & Ross.* M. Judgment, 21 March, 1874. Taschereau, Ramsay, Sanborn, Loranger JJ. Taschereau, dis. (1) But if the respondent has acquiesced by joining in the proceedings, allowing a *reprise d'instance* by the representatives of the deceased, the motion to reject the appeal will be refused, as coming too late. *Hagarty & Morris.* M. Judgment 21 Sep. 1874. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn JJ. Rep. 19 J. 103.

§ 2. *Authorisation.*—A married women who appeals must be authorized, and an appeal brought without authorisation will be rejected.

(1) NOTE.—" All writs of error and appeal may be brought either by the party against whom the judgment complained of was rendered, or, in case of his death, by his executors or administrators, if the judgment was to record any debt, damages or personal property, or by his heirs, devises, or assigns (ayant cause) if the judgment was for the recovery of real estate or the possession thereof, or if the title to real estate was determined thereby."

St. Jean & The Metropolitan Bank. M. Judgment rejecting appeal. Sep., 1874, Monk, Taschereau, Ramsay, Sanborn JJ.

And so where a woman domiciled in Canada and living with her husband there, went to the state of New York, where divorce is permitted, and obtained a divorce under that law, and sued her husband in Canada to account to her for her private fortune, without authorisation, and as an unmarried woman, it was *held*: that the courts of this country could not recognize such divorce, and that the action against her husband could not be instituted without authorisation. *Fish & Stevens.* M. Judgment reversing. 19 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Monk and Cross, JJ., dis. Rep. 6 Leg. News 329, 3 Déc. d'A. 293. Reversed in the Supreme Court.

The curator to a person interdicted cannot appeal from a judgment, until he is authorized by the judge, or the prothonotary, on the advice of a family council, but he will be given a delay to procure the authorisation,—the authorisation of the tutor stands on a different footing from that of the wife. *Clement & Frances.* M. Judgment, 26 September, 1883. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 6 Leg. News 325.

§ 3. *Enquête in appeal.*—In order to take evidence to prove acquiescence in the judgment of the Court below. *Jordan & Jetté.* Judgment, Sep. 1875.

Where a petition has been filed praying the dismissal of an appeal on the ground of *acquiescement*, and affidavits are filed in support and against the application of a contradictory character, leave will be granted to cross-examine the deponents. *Hotte & Champagne.* M. Judgment, 19 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby. JJ. Rep. 25 J. 227. 2 Dec. d'A. 127.

§ 4. *Appeal rejected on motion.* Where action is not appealable by its nature, or if essential formalities have not been observed, or if the delay to appeal has

expired, appeal may be rejected on motion.

So there may be a motion to reject an appeal, the action being under the lessor and lessees Act, and the annual rent being only $50. But the lease which was for seven years was not pure and simple and there was a clause permitting Defendant to purchase the property at any time during the lease for $1000. The judgment complained of rescinded the Deed of lease. *Held* that this involved question of title to land, and the motion was rejected. *Cauchon & Anderson*, Q. Judgment, 1 Dec., 1874, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

And an appeal will be dismissed, on motion, if taken out in the name of a party deceased. And the motion of the representatives to take up the instance will be refused. *Kirby & Ross*, M. Judgment, 21 March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ., Taschereau, J. dis. Reported 18 J., 148.

But if the Respondent have acquiesced by joining in the proceedings allowing a *réprise d'instance* by the representatives of the deceased, the motion to reject the appeal will be refused as coming too late. *McCarthy & Morris*, M. Judgment, 21 Sept., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 103.

A motion by Respondent to quash a writ of appeal because it was made returnable on the 17th day, instead of on the 20th (1121 C. C. P.) will be rejected. *Phillips & Sutherland*, M. Judgment, Feb. 1875. Dorion, C. J., Monk, Sanborn, JJ. Reported 19 J. p. 134.

One appeal may be taken from more judgments than one. *Ib.*

An appeal will be dismissed on motion if the Appellant fails to file reasons of appeal. *Union Bk. & Fournier.* Judgment 6 December, 1873. Badgley, Monk, Taschereau, Ramsay, JJ.

And if security is not put in within

eight days, on appeal from a judgment of the insolvent court, the appeal will be dismissed on motion. *Gibson & McArthur*, M. Judgment, 20 June, 1879.

In support of motion to reject appeal, the copy of the writ should be produced. *Landreville & St. Patrick's Benevolent Society.* Judgment, 22 Dec., 1877.

But the non-production of the copy of the writ of appeal is not fatal, on a motion for non-pros., and its absence may be accounted for by affidavit establishing satisfactorily that it issued and has been lost. *Harvey & Deziel*, M. Judgment, 22 Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 280.

It is for the appellant to show that the failure to send up transcript is not the fault of his attorney. *Stewart & Black*, M. Judgment, 11 Dec. 1877.

And so also it was held in the case of *Cotton & Ontario Bank*, M. Dec. 1877.

A writ of appeal may be amended. *Côté & Leclerc*, Q. Judgment, 5 June, 1875. Dorion, C. J., Monk, Taschereau Ramsay, Sanborn, JJ.

§ 5. *Evidence.* — The Court of Queen's bench being a Court of Appeal, has to consider the evidence in all cases except those of error and where the appeal is only on matter of law; so where the Court of Review has modified a judgment giving excessive damages for a trespass, the Court of Appeal will confirm such judgment. *Mann & MacDonald*, 15 May, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

But when the case turns upon evidence which is contradictory, the Court will not reverse a judgment on a mere question of fact, when the view taken by the Court below can be reasonably maintained, although the court here inclines to a different view. The Court does not, however, assimilate

the judgment of the Court below to the finding of a jury. If, however, the judgment of first instance has been reversed in review, the Court of Appeal will decide which judgment should stand and will therefore have to appreciate the testimony independantly. *Nicholson & Metras*, M. Judgment reversing, 30 June,1881, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 4 Leg. News 281. See also remarks in *Stewart & Brewis*, 26 J. 14, 1 Déc. d'A. 319, 4 Leg. News, 203

And where the Superior Court had allowed the plaintiff, a laboring man, three thousand dollars for an accident, attributable in great part to the fault of the Defendant, for the loss of a small part of his forefinger and for his sufferings, the Court of Appeal reduced the damages to $600. *Desilets et al & Gingras*, Q. 3 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 275, and also in another case of *Reed & Levi*, the same principle was laid down, and the damages were reduced. *Reed & Levi*, Q. Judgment reversing the judgment against appellant, as to the amount of damages, 5 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. diss. (1)

(1) NOTE. These cases were both reversed in the Supreme Court. It is impossible to tell on what principle the case of *Gingras & Desilets* was reversed for it is not reported. It is not improbable that the report of the case of *Reed & Levi*, 6 Sup. C. Rep. 432, would do as a report for both. The learned Chief Justice says the case of *Gingras & Desilets* and also the case of *Lambkin & South Eastern Railway Company* are *opposite* to that of *Reed & Levi*. It would be difficult to find two cases more unlike than that of *Gingras & Desilets*, and of *Reed & Levi*, and the Lambkin case was tried by jury. Mr. Justice Fournier admits that the Court of Appeal had to decide the fact *suivant sa conscience*, and then he proceeds to say that he had no means of having any conscience in the matter, for he could not say why the damages in the Reed case should not have been fixed just as properly at $2,000 as at $500. This was alarmingly vague, and the short heading of the report,(by whom supplied does not appear) is in these terms: " In an action of damages, if the amount awarded in the Court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge (the exercise of a discretion on his part being in the nature of the case required) an appellate Court will not interfere with the discretion such judge has exercised in determining the amount of damages." If this loose and somewhat sensational sentence is the *dictum* of the Supreme Court, the decision probably amounts to no more than this Court has always held; but it does not result from anything any of the judges in the Supreme Court is reported to have said, and its application to the Gingras case is out of the question; for if according any amount of damages could shock the sense of justice (since this is the test), it must be in giving to a man like Gingras, for a trifling injury, arising from circumstances in which he was not wholly blameless, a capital sum the interest of which could be annually greater than his whole earnings.

And the Court of appeal will not maintain an action evidently frivolous owing to the smallness of the amount, where there is no principle at stake. So where the Superior Court exercised its discretion in setting aside an opposition to a seizure, based on the fact that the costs had been taxed erroneously ten cents too high,—and a judgment in Review reversed such judgment in first instance, the judgment of the Court of Review will be set aside in Appeal. *Côte & Samson*, Q. Judgment confirming 7 Dec., 1882, Monk, Ramsay, Tessier, Cross, Baby, JJ., Rep. 5 Leg. News 421, 8 Q. L. R. 357, 12 R. Leg. 112.

§ 6. *Miscellaneous.* — Motion in appeal to reject a paper in the nature of a *Requête Civile* filed subsequent to the rendering of the judgment appealed from. Rejected. *Jeannotte & Rassette*, M. Judgment 1874.

Consolidation of suits. Where since non appealable actions in the Circuit Court are consolidated with one that is appealable, as involving the same question, the whole will be adjudicated on an appeal in the principal case. *Montreal & Sorel Railway Company & Vincent et al.* M. Judgment confirming

24 November, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

From the Superior Court.—
§ 1. WHEN APPEAL LIES.
§ 2. APPEARANCE.
§ 3. SECURITY.
§ 4. INSOLVENCY.
§ 5. MISCELLANEOUS.

§ 1. *When appeal lies.* — Appeal lies to the Court of Queen's Bench upon any final judgment rendered by the Superior Court, besides those mentioned in art. 1114 C. C. P. (1) except in cases of *Certiorari* and in matters concerning municipal corporations or offices, as provided in article 1033 C. C. P. and except also cases which have been inscribed for review before three judges, and shall, on such inscription, have been proceeded with to judgment and if such judgment confirms that rendered in the first instance, 1115 C. C. P., 37 Vict., c. 6, s. 1 & 2 (2). And except also from judgments in trials under the Dominion election act (37 Vic., c. 6, s. 29). And except also from judgments under the "Quebec controverted election act," *v.* ERROR. (38 Vic., cap. 8, sect. 90, 2nd Sess. 1875, Q.)

Article 1115 C. C. P. suffered so many legislative changes that it is necessary, in order to make the different decisions clear to give the enactments at length. As the article 1115 first stood in the Code it was in these words:

"An appeal lies to the same Court (Q. B.) upon any other (than appeal by way of error) final judgment rendered by the Superior Court, except in cases of *Certiorari*. and in matters concerning municipal corporations or offices, as provided in article 1033. By the 34 Vic., c. 4, sect. 12 (L). it was enacted that," article 1115 of the said Code (C. C. P.) is hereby amended by adding at the end thereof the following words: and except also in cases for an amount not exceeding two hundred dollars, in which the judgment has been recovered in review before three judges, assented to 24th December, 1870. The 36 Vic., c. 12, (L) then provided that any party other than the one inscribing in review before three judges, might file in the office of the prothonotary, a notice that he did not waive his right to appeal. This declaration saved his right to appeal, if the judgment in review was against him. If he made no such declaration he acquiesced in the review and he lost his right to appeal against the judgment in review. Sects. 1 & 3, on receiving notice of this declaration the party inscribing might discontinue his inscription in review and appeal. Sect. 2. If the party inscribing persisted in his inscription and the judgment in review was unfavorable to him he could not appeal. Sect. 2. This act was assented to 24 December, 1872. By the 37 Vic., c. 6, sect. 1, it was provided that: "no person, *who shall have inscribed in review* before three judges, any cause in the Circuit Court susceptible of appeal to the Court of Queen's Bench, or any cause in the Superior Court, and shall on such inscription have proceeded to judgment, shall be entitle to appeal to the Court of Queen's Bench, from the judgment of the Superior Court sitting in review, if such judgment confirms that rendered in the first instance." Assented to 28th January, 1874. See also notes on art. 496 C. C. P. by Mr. Justice Taschereau of the Supreme Court.

A defendant, whose petition to be released from custody under *a capias ad resp.* has been rejected, has a right to appeal *de plano* from the judgment rejecting such petition, and, therefore. an application by him for permission to appeal will be rejected on that ground.

A defendant in such a case cannot obtain permission to appeal *in formâ pauperis. The Canadian Bank of Commerce & Brown et al.* M. Judgment 12 Dec. 1874. Dorion C. J. Monk, Taschereau, Ramsay, Sanborn. JJ. Rep. 19 J. 110.

An appeal may be instituted from a judgment dismissing a petition for release under a *capias*, and from various other interlocutory orders or judgments

in connection with such *capias* rendered partly by the Court below and partly by a judge thereof in chambers, by one and the same writ, and without obtaining the previous permission of the Court of Queen's Bench to appeal from such interlocutory orders or judgments. *Phillips & Sutherland*, M. Judgment, 13 Feb. 1875, Dorion C. J. Monk, Taschereau, Ramsay, Sanborn JJ. Rep. 19 J. 134.

Writs of prohibition are obtained by proceedings before the Court *or* judge. C. C. P. 1031, 1023.

And so an appeal lies to the Court of Queen's Bench, from a judgment in Chambers refusing a writ of prohibition. Exp. *O'Farrell*, Q. Judgment, 6 March, 1875, Dorion C. J. Monk, Taschereau, Ramsay, Sanborn JJ.

But there is no direct appeal to the Court of Queen's Bench from an order of a judge in Chambers homologating the advice of a family council and allowing the sale of real estate belonging to minors; for the duty of the judge is ministerial, and can be performed by the prothonotary. *Beliveau & Chevrefils*, Q. Judgment, 8 march, 1876, Dorion C. J. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 664.

The appeal was from a judgment of the Superior Court refusing a writ of prohibition to prevent the respondent Aubé, a justice of the Peace, who had condemned the appellant to pay the penalty provided by art. 793, Municipal Code, from executing the judgment. The respondent moved to reject the appeal on the ground that it was a municipal matter and came within art. 1033 C. C. P. *Held*, that this was not a matter relating to municipal corporations and offices, within the meaning of article 1033, C. C. P. *The Corporation of St. Lazare & Aubé et al.* Q. Judgment, 4 March, 1876. Dorion C. J. Monk, Ramsay, Sanborn, Tessier JJ.

Where no declaration has been made under section 1, 36 Vict. c. 2, Q., appeals will be dismissed on motion.

Dayon & Perron, Q. Judgment dismissing appeal. 8 September, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn JJ.

After the passing of the Quebec Statute 37 Vic., c. 6, s. 112, no appeal lies from a judgment of the Court of Review, modifying the judgment of the Court of first instance in favour of appellant. *Beauchêne & L'Abbé*, Judgment, 2 Dec. 1875. Dorion C. J. Monk, Ramsay, Sanborn JJ. Rep. 10 Rev. Leg. 115.

No appeal lies to the Queen's Bench from an order of a judge of the Superior Court in Chambers, permitting a candidate at a federal election to examine the ballots. *Mackenzie & White*, M. Judgment 20 September 1875, Rep. 7 Rev. Leg. 218.

There is no appeal under the Dominion Election Act of 1874; the determination of the judge certified to the speaker being declared final to all intents and purposes, save in the case of appeal as hereinafter mentioned (Sect. 29.) The appeal is to the Court of Review, and the court shall determine and certify its determination and decision to the speaker upon the several points and matters, as well of fact as of law, upon which the judge might otherwise have determined or certified his decision, in the same manner as the judge would otherwise have done, in pursuance of sections twenty-nine, thirty and thirty-one of this Act, and the determination of the Court thus certified shall be final to all intents and purposes. Sect. 33. And this enactment is not *ultra vires* of Parliament, nor incompatible with arts. 1115 and 1116 C. C. P. *Massue & Bruneau*. M. Judgment, on motion asking leave to appeal, refusing the application, 18 Dec. 1878 Sir. A. A. Dorion C. J. Monk, Ramsay, Tessier, Cross J J. Rep. 3 Leg. News 38 J. 23 J. 60. 9 Rev. Leg. 626.

§ 2. *Appearance.*—Must the appearance of Defendant be served on the opposite party? See arts. 83 and 462 C. C. P. *Proteau & Municipality of*

Halifax, Q. Judgment granting leave to appeal 6 Dec., 1873. Badgley, Monk, Taschereau, Ramsay, JJ.

A Defendant who has made default, and is allowed to appear and plead to the action will not, under such order, be allowed to file a dilatory plea asking for security for costs. *Hill & Ware*, M. Judgment June 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Appellant moved to be relieved of his default and to be allowed to file an appearance. Respondent, subsequently to signification of appellant's motion, moved to reject Appellant's appearance. The motion of Appellant was granted on payment of costs, and Respondent's motion was rejected without costs. *Bickle & Richard*, Q. Judgment 1st Dec., 1877.

§ 3. *Security.* — Le cautionnement fourni pour appeler d'un jugement de la Cour Supérieure est irrégulier, s'il n'a été précédé d'un avis à la partie adverse, et que, dans ce cas l'appel doit être renvoyé. *Dorion & Dorion*, M. Judgment 27 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Rep. 3 Dec. d'A. 387.

Security in appeal from a judgment in the Insolvent Court must be put in within eight days, and where the writ has issued without the security being so put in, the appeal will be dismissed on motion. *Gibson & McArthur*, M. 20 June 1877.

Where there is a motion to dismiss appeal, one of the sureties having become insolvent, delay will be granted appellant to put in another surety. *Kane & McLean*, Q. Judgment 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The appellant deposited bonds of the City of Montreal as security for an appeal by the Corporation of that City to the Privy Council. These bonds were held to be an insufficient security for the Corporation, and the delay was prolonged to put in security till the 4th. In Chambers, Monk, J., 2 Nov., 1876. On the 4th the Corporation deposited $1000 as security, but it appearing that this sum was insufficient, they subsequently deposited $800 additional.

Respondent then moved to be allowed to execute his judgment, on the ground that the failure of appellant to put in security within the delay of six weeks first allowed, the respondent had acquired an absolute right to execute his judgment. *The Mayor &c. of Montreal & Hubert*. M. Judgment, 9 March. 1877.

§ 4. *Insolvency*—A local act laying down general rules as to appeal will control appeals in matters of insolvency. *Stewart es qua. & Angers*, M. judgment, March, 1874.

So where an act of the legislature of the Province of Quebec, passed in 1872. (36 Vic. c. 12, Sect. 3), limited the right of appeal in certain cases which had come to the Court of Review, it was held that this enactment applied to cases in insolvency, and that it was within the powers of the local legislature, as it contravened no act of Parliament relating to insolvency.

Appeal from judgment in Insolvent Court. Appellant did not put in security within eight days. On the tenth day the judge refused to take the security, and the appeal was not further prosecuted, but the writ had issued. Motion to reject the appeal was granted. *Gibson & McArthur*, M. Judgment, 20 June, 1877.

An appeal from a judgment in review in a matter of insolvency, taken on the ninth day, is a day too late, will be rejected on motion, the Court having no jurisdiction to extend the delay of the Statute. *Graftis & Sleeper*, M. Judgment 21 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 76. 1 Leg. News 31.

Also the case of *Cotton & The Ontario Bank.*, M. Jugment, Dec. 1877.

A motion was made for special leave to appeal after the expiration of eight days from the time the judgment purported to be rendered in open Court, as required by the insolvent act 1875, Sect. 128. Affidavit setting forth that judgment purported to be rendered 4th July. On the 7th and 8th, 12th and 13th Appellant's counsel tried to obtain copy of judgment but it was not drawn. On 14th he applied at Prothonotary's office without any better result. The judge in Chambers then refused to take the bond. Leave to appeal refused. *The Canada Guarantee Co. & Bank of Hochelaga*, M. Judgment, September, 1881.

A rule to show cause why a writ of appeal should issue will be rejected, when the only cause for the rule was the mere fact that the delay for appealing under the Insolvent Act had expired, and unless there was a very clear case to shew that there was no appeal, and that the party was seeking to obtain an appeal, simply to frustrate the ends of justice. *Cotton & The Ontario Bank*, M. Judgment, 22 Sept. 1877, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 22 J. 77.

§ 1. *When appeal lies.*—An appeal lies from any interlocutory judgment of the S. C. in an appealable case (1) when it in part decides the issue; (2)when it orders the doing of a thing which cannot be remedied by the final judgment; (3) when its effect is unnecessarily to delay the trial of the suit. 1116 C. C. P.

§ 2. *Motion for leave to appeal.* Appeal from an interlocutory judgment cannot be instituted without leave being granted by the Court of Q. B.

It is discretionary with the Court to grant or refuse leave to appeal, even in cases falling within one or other of the categories mentioned in art. 1116 C. C. P.

Leave to appeal will only be granted on motion duly signified.

The Court will not grant leave to appeal from an Interlocutory order of a judge in Chambers authorizing the opening of the door of an insolvent. *Whitlock & Tyre*, M. Judgment, Sep. 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal will be granted from a Judgment dismissing an *exception à la forme. Nadeau & Baby et al.*, Q. judgment 5 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal will be refused from judgment dismissing a *défense en droit. Daigneault & Perreault*, M. Judgment March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. *Hall & Turcotte*, Q. Judgment 1 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal will be refused from a judgment of *preuve avant faire droit. Jobin & Barbeau*, Q. Judgment 5 Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An appeal will not be allowed on a question of costs alone. *Crosbie & Blacklock*, M. Judgment confirming 27 January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Leave to appeal will not generally be granted on a question purely of costs, nor on mere matters of procedure, nor where the party has appeared to acquiesce by taking subsequent proceedings. *Hart & The Northern Ass. Co.*, M. Judgment 1874.

Leave to appeal will not be granted from a judgment on a mere matter of procedure. *Phillips & Choquette*, M. Judgment, March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

A case may be inscribed for *enquêtes et mérites*, without filing articulation of facts and answers, when the delay for filing the same had expired before the date of the inscription; and an interlocutory judgment, rejecting such inscription, is a judgment from which an appeal will lie *Bellay & Guay*, Q. Judgment 1 Dec., 1874. Dorion, C. J.,

Monk. Taschereau, Ramsay, Sanborn, JJ., 4 Q. L. R. 91.

Leave to appeal may be granted from an interlocutory judgment foreclosing a party at *Enquête* for non appearance. *Doutney & Richard.* Judgment June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. On the merits of the application, Ramsay & Sanborn, JJ., dis.

And so also in *Hall & King et al.*, Q. Judgment 1 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal from an interlocutory judgment will not be granted where in the opinion of the Court of appeal, the judgment is correct. *Pacaud & Poisson.* Judgment 6 December, 1873. Duval, C. J., Badgley, Monk, Taschereau, Ramsay, JJ.

Leave to appeal from a judgment ordering an *expertise* may be refused in the discretion of the Court, although it decides part of the issues. *Been & Valin*, Q. Judgment 3 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal will not be granted from an interlocutory judgment allowing a wife aliments during the pendency of a suit with her husband, unless it was evident that injustice had been done. *Blacklock & Crosby*, M. Judgment, March, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where Defendant's pleas are, by an interlocutory judgment, altered, but not so as to prevent him proving his whole defence, leave to appeal from such interlocutory will not be granted. *Leblanc & Pellerin et al.* Q. Judgment, March, 1875. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

§ 2. *Motion for leave to appeal.*

Service of motion for leave to appeal is not sufficient if made on attornies of

the other party, after the record has been sent back to the Superior Court. *Asselin & de Gaspé et al.* M. Judgment 1874.

Motion for leave to appeal being served on Respondent, he filed a renunciation to the judgment in his favour and offered to pay costs, but did not tender it on Appellant's motion. Rejected on Respondent paying costs. C. C. P. 477. *Bellay & Guay*, Q. Judgment 1st. Dec. 1874. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn JJ. Rep. 4 Q. L. R. 91.

From Circuit Court.

The right of appeal from decisions of the Circuit Court to the Court of Queen's Bench is provided for by Art. 1142. C. C. P.

By art. 100 M. C, any *procès-verbal* roll, resolution or other order of a municipal council may be set aside by the Magistrates' Court or by the Circuit Court for the country or district, &c. By art. 926, an appeal lies to the county council "from the homologation of any *procès verbal* made by any local council" &c. If the proceeding be by way of Appeal to the Circuit Court, and it be appealable in its nature, appeal lies to the Queen's Bench, (C. C. P. 1142) although, it seems, the decision of the county council could not have been appealed to the Circuit Court, (M. C. 1061. 2) and that no appeal lies from the county council. *McLaren & the Corporation of Buckingham*, M. Judgment, 21 June, 1875, Monk, Taschereau, Ramsay, Sanborn, Sicotte JJ. Sanborn J. dis.

In a case instituted before the Circuit Court, under Section 100, of the M. Code, the appeal to this court is not taken away. *Rolf & the Corporation of the County of Stoke* M. Judgment, 22 March, 1879, Dorion, C. J. Monk, Ramsay, Tessier, Cross JJ. Rep. 24. J. 103, 3 Leg. News 69.

"Any municipal elector in his own name, may, by a petition presented to

the Magistrate's Court or to the Circuit Court of the county or district, demand and obtain, on the ground of illegality, the annulment of any municipal by-law, with costs against the corporation." M. C. 698. A petition was presented to the Circuit Court for the district of Bedford, praying that a By-Law prohibiting the sale of intoxicating liquors should be annulled. The petition was rejected, and petitioners appealed. *Held*, that the by-law complained of was a by-law within the meaning of art. 698 M. C., and that the judgment rejecting the petition was appealable under art. 1142, 3, C. C. P. *Coosey & the Corporation of the Co. of Brome.* M. Judgment reversing, 21 Sep. 1878. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. The Chief Justice dissenting, but not on this point. Rep. 1. Leg. News 519.

Motion to reject. This is an appeal from a judgment of the Circuit Court, exercising original jurisdiction and is not within the operation of art. 1077, M. C. *Blackburn & the Corporation of Château Richer*, Q. Motion rejected, Feb. 1882.

And the case coming up on the merits, *held*: under article 100 of the M. C., every elector has a right to proceed before the Circuit Court with regard to any valuation role. And there is appeal from any judgment of the Circuit Court when the amount in litigation exceeds $100. *Blackburn & Corporation of Chateau Richer*, Q. Judgment reversing 5 Oct. 1782. Sir. A. A. Dorion C. J. Ramsay, Tessier, Cross, Baby JJ.

An appeal lies to the Court of Queen's Bench from a judgment on an opposition, and a person who claims a total exemption from taxes, may, if proceeded against as a rate payer, avail himself of the remedy allowed to rate-payers under art. 970, Municipal Code. *The Montreal Cotton Co. & the Corporation of the Town of Valleyfield de Salaberry.* Judgment 17 Sep. 1880. Sir. A. A. Dorion, C. J., Monk, Ramsay, Chagnon JJ. Rep. 2 Leg. News 338. 3 Leg. News 317, 9 R. Leg. 551.

The appeal is not taken away in cases of expropriation by a municipality, when, by the judgment complained of the report of the commissioners has been rejected. *The Mayor &c. of Mont real & Frothingham et al.* M. Judgment Sep. 1884. Dorion C. J. Monk, Taschereau, Ramsay, Sanborn JJ.

Where there is an action in the Circuit Court for taxes, to the amount of $908.95, appeal is not taken away by art. 1077 M. Code. *The Corporation of St-Guillaume & the Corporation of the County of Drummond*, Q Judgment March 1874. Dorion. C. J. Monk, Taschereau, Ramsay, JJ.

There is no appeal to the Circuit Court from a decision of a Municipal council as to the revision of electoral lists. The appeal is to a judge of the Superior Court. *St-Henri & Viau.* M. Judgment reversing, December 1875. Dorion C. J., Monk, Ramsay, Sanborn, JJ.

Appellant cannot join to an appeal from a judgment in review, an appeal from the original judgment in the Circuit Court, from which he had not appealed within the delay fixed by art. 1143, C. C. P. *Logan & Kilgour* M. Judgment rejecting appeal from Circuit Court, 21 December, 1882. Sir. A. A. Dorion C. J . Ramsay, Tessier, Cross, Baby JJ. Rep. 3 Dec. d'A. 336.

Leave to appeal from an interlocutory judgment of the Circuit Court will not be granted. *Richard & Girard*, Q. Judgment, 3 June 1875, Dorion C. J. Monk, Taschereau, Ramsay, Sanborn JJ.

Le cautionnement pour appel d'un jugement de la Cour de Circuit doit être dans les termes de l'article 1143—que l'appelant poursuivra l'appel, répondra à la condamnation et paiera les frais au cas où le jugement serait confirmé ;— et qu'une obligation de la part de la caution de payer une somme de $200 dans le cas où l'appelant ne poursuivrait pas l'appel, ne répondrait pas à la condamnation et ne paierait pas les frais si le jugement est confirmé, n'est

pas un cautionnement suffisant. *Felton & Bélanger et al.* M. Judgment confirming 24 Nov. 1882. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Dec. d'A. 107.

A security bond in appeal from the Circuit Court may be amended by supplying the description of the real estate on which the security justified, and which had been omitted in the bond. *The Montreal Cotton Co. & the Corporation of the Town Salaberry of Valleyfield*, M. Judgment, Appellant allowed to amend bond, 16 September, 1879. Sir A. A. Dorion, C. J. Monk, Ramsay, Tessier, JJ. Rep. 24 J. 159, 2 Leg. News 238, 9 R. Leg. 551.

There should be notice of motion to reject an appeal from the Circuit Court, the record not having been returned. *Turcotte & Rioux*, Q. Judgment 4 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Upon an appeal from an interlocutory judgment any party may produce and file a factum, and if succesful the costs of the same will be taxed and allowed. But no delay can be granted for the filing of such factum. *Thornton & Trudel*, Q. Judgment confirming, 8 October, 1885. Sir A. A. Dorion C. J. Monk, Ramsay, Cross, Baby, JJ. 11 Q. L. R. 216.

To the Supreme Court.—*When it lies.*—Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction, now or hereafter established in any Province of Canada, in cases in which the Court of original jurisdiction is a Superior Court; Provided that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars; and the right to appeal in civil cases given by this Act, shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases, and cases of *mandamus*, *habeas corpus*, or municipal by-laws, as hereinafter provided. Supreme Court Act, C. 38 Vic. cap. 11.

It is the amount demanded and not the amount awarded which regulates the right of appeal to the Supreme Court, although section 17 of the Supreme Court Act is in these words: "No appeal shall be allowed in the Province of Quebec, in any case wherein the sum or value of the matter in dispute does not amount to $2000. *The Grand Trunk Railway Co. & Godbout*, Q. 8 Sep. 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Monk, and Tessier, JJ., dis. Rep. 3 Q.L.R., 346." (1)

To the Privy Council.—*When it lies.*—"An appeal lies to Her Majesty in Her Privy Council (1) from final judg-

(1) Note.—After very full consideration of the subject this view has been confirmed in the Supreme Court on several occasions. See the case of Hart & Joyce, 1 Sup. C. Rep. 321. Gingras & Desilets. Levi & Reed, 6 Sup. C. Rep. 482. In this last case one of the learned judges differed, making a distinction between it and the case of Hart & Joyce, in which last case the action was for an appealable amount and the judgment for $100, and the defendant appealed. In Levi & Reed the plaintiff appealed. He therefore contended that the matter in dispute in the first case was the whole demand, while in the latter case it was only the amount of judgment that was in dispute. It was as though the plaintiff had filed a *retraxit*. There is perhaps some difficulty in construing the words of the statute so as to support the judgment, and on the other hand the difficulty is certainly not less in taking the amount of the judgment as deciding the right of appeal. The statute does not say that appeal lies when the matter in dispute by the appellant amounts to $2000, but that appeal lies *in any case* wherein the sum or value of the matter in dispute is, &c. It is therefore the amount of the *case* which is the test of its *appealability*. Mr. Justice Taschereau's distinction appears to me to be visionary, and the illustration of a *retraxit* fallacious. The *case* is altered by the *retraxit*, it is not by the judgment. It would also have the inconvenience of making the case appealable for one party and not for the other, a construction the words of the statute will not bear.

ments rendered in appeal or error by the Court of Queen's Bench:

1. In all cases where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to Her Majesty;

2. In cases concerning titles to lands or tenements, annual rents and other matters by which the rights in future of parties may be affected;

3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling." C. C. P., 1178.

Leave to appeal to the Privy Council is only granted from final judgments. (1)

Leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench, Quebec, will be granted, although the opposite party has already obtained leave to appeal to the Supreme Court of Canada. *The City of Montreal & Devlin.* Judgment 22 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 1 Leg. News 151.

Under the Insolvent Act of 1875, the appeal to the Privy Council is not taken away. See sections 8 and 128. *Knight & La Banque Nationale.* Q. Judgment 8 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

The defendant has a right to appeal to the Privy Council from a judgment on an action to set aside a Crown Patent, establishing Respondent's title to lands. *Pacaud & Rickaby.* Q. Judgment 4 Dec., 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

An appeal to the Privy Council can be allowed only from a final judgment. But as a judgment dismissing an attachment before judgment cannot be remedied at any other stage of the case, the Court holds that the judgment was a final one, and the motion for leave to appeal to the Privy Council must therefore be granted. *Dallimore & Brooke.* M. Judgment Sep. 1874.

Wotherspoon's C. C. P. note to art. 1178.

Leave to appeal to the Privy Council will be granted from a judgment maintaining a *capias*. *Goldring & The Hochelaga Bank.* M. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 232.

Commissioners were appointed for the expropriation of certain real estate in Montreal, under 27 and 28 Vic. 1 c. 60. They made an award, which the Corporation thought extravagant and before the homologation of the report, the Corporation moved the Superior Court to have the Commissioners removed for want of diligence and fidelity in the discharge of their duties, (sect. 9.) This motion was granted and new Commissioners were appointed. The Commissioners appealed to this Court and the judgment of the Superior Court was reversed. Leave to appeal to the Privy Council was resisted on the ground that this was an Interlocutory Judgment. *Held*, that it was final as regards the Commissioners. Leave granted. *Brown & al & The Mayor, &c., of Montreal.* Judgment 1874.

There is an appeal to the Privy Council from a judgment setting aside an injunction, if the amount involved be sufficient, or if the subject matter be of a nature to permit of an appeal in an ordinary case. *McDonald & Joly.* M. Judgment 22 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. 2 Leg. News 104.

No appeal lies to the Privy Council from a judgment upon demurrer, for there is nothing in the judgment which cannot be remedied after final judgment; the judgment is merely interlocutory, and motion for leave to appeal to the Privy Council cannot be granted.

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(1) In cases in which the appeal to the Q. B. is lost by decision in Review under 37 Vic., c. 6, s. 1, there may be appeal to the P. C. Ib. s. 2.

Brooke & Bloomfield, M. Judgment, 21 Sep., 874.

Wotherspoon's C. P. C., note to article 1187.

The judgment granting a new trial is Interlocutory, and leave to appeal to the Privy Council, will not therefore be granted. *South Eastern Counties Railway Co. & Lambkin.* M. Judgment, 13 June, 1877.

NOTE.—Application was subsequently made to the Judicial Committee for leave to appeal, and it was granted, and the judgment granting a new trial was reversed. It is considered that this decision of the judicial committee does not reverse the rule that leave to appeal will not be granted on an interlocutory judgment by the Court of ueen's Bench.

Leave to appeal to the Privy Council will not be granted from a judgment refusing to discharge a party arrested under the warrant of the Speaker of the House of Assembly of the Quebce Legislature. It is because the case was a criminal case? The judges were divided. *Exp. Dansereau*, M. Judgment, 19 Feb., 1875. Dorion, C. J., Monk, Taschereu, Ramsay, Sanborn, JJ.

Leave to appeal to the Privy Council will not be granted from a judgment maintaining a prohibition against the council of the bar. *O'Farrell & Brassard*, Q. Judgment, 4 March, 1878, Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 115.

Leave to appeal to the Privy Council will be refused on the application of a relation from the judgment of the Court of Queen's Bench, allowing a writ of Prohibition to issue, restraining the Council of a section of the bar. *O'Farrell & Brossard.* Judgment, 4 March, 1878, Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News, 115.

The amount originally in issue must govern the right of Appeal to the Privy Council. And even where there is a

cross-demand for an amount in itself, not appealable, it is so connected with the original case as to form part of the matter in dispute in the case, and it is therefore appealable. *Bartley. & Bartlett & E. Contra.* M. Judgment, 14 Dec., 1877.

In calculating the amount necessary to make a case appealable the interest accrued during the suit, cannot be considered. *Stanton & The Home Insurance Co.* M. Judgment, 20 Sep., 1879, Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 2 Leg. News, 314; 24 J. 38. (1)

Where the action is to recover back a sum of money exacted illegally from the Appellant under an assessment, the validity of the roll not being in question, leave to appeal to the Privy Council will not be granted. Future rights, at least such rights as are contemplated by the article, are not affected by the judgment. If the roll were in existence for three years, the total amount at stake would not give the right of appeal. *Valois & Les Commissaires d'ecoles d'Hochelaga*, also *Lussier & The same*, M. Judgment, 17 Sep.. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ., Rep. 3 Leg. News, 309.

The certificate of the Registrar of the Privy Council stated that the case "stand-referred" to the Privy Council and it was moved that the record should be ordered back to the Superior Court because this certificate does not show that any proceedings had been taken within six months. Motion refused. *The Mayor &c of Montreal, & Brown*, Judgment, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. (2)

A judge of the Court of Queen's

(1) NOTE.—Two cases were decided in the same sense one 21 Dec. 1872, the other 22 Sep. 1873, consequently before the time covered by this index. Wotherspoon's C. C. P. note to art. 1178.

(2) In the Privy Council the appeal was dismissed.

Bench has power to extend the delay for giving the security on an appeal to the Privy Council beyond the delay ordered by the Court, as that within which security must be given, when such judge is seized of the matter before the expiration of the delay originally granted; and when security is given within such extended delay, the respondent cannot execute the judgment appealed from. *The Mayor &c., of Montreal & Hubert et al.*, M. Judgment, 21 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 85.

On motion, and by consent of both parties, an *acte argué de faux*, may be ordered to be sent to the Privy Council. *Panet & Hamel.* Q. Judgment, 3 June, 1875, Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

Application in appeals from Superior Court whether final or interlocutory?

Motion to strike out part of the answers in appeal. *Galt & Evans.* Judgment. Sep. 1884.

APPRENTICE.—A contract of apprenticeship will be annulled if it appear that the apprentice has not a fair opportunity of acquiring proficiency in the art which the master engaged to teach him. *Baker & Lebeau.* M. Judgment confirming, 21 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Cross J., dissenting. Reported 7 Leg. News 299.

ARBITRATION AND ARBITRATOR.—Arbitration is the determination of a controversy by a person or persons chosen by the parties thereto. An arbitrator is the person so chosen. In order to bind the parties there must be a submission in writing, by which act the parties agree to abide by the decision of the arbitrators whom they agree upon. C. C. P. 1341, 1345.

"But the Court may, of its own motion or upon the application of one of the parties, refer to the decision of arbitrators any cases of dispute between relations, concerning partitions, or other matters of fact which it is difficult for the Court to appreciate; and also any other case, if the parties consent to it." C. C. P. 341.

"Deeds of submission made out of court must state the names and additions of the parties and arbitrators, the object in dispute, and the time within which the award of the arbitrators must be given." C. C. P. 1344.

"During the delay fixed by the submission the appointment of the arbitrators cannot be revoked, except with the consent of all the parties. If the delay is not fixed, either of the parties may revoke the submission when he pleases." C. C. P. 1347.

"The submission becomes inoperative:

"1. In the case of the death, refusal, withdrawal or inability to act of one of the arbitrators, unless some clause provides that it shall avail notwithstanding that such arbitrator shall be replaced by another chosen by the parties or by the remaining arbitrator or arbitrators or otherwise;"

"2. In the case of the decision not being given before the expiration of the delay fixed;"

"3. By the failure to agree if the appointment of a third arbitrator has not been provided for;"

"4. By the mutual consent of the parties;"

"5. By the loss of the object which forms the subject of the submission;"

"6. By the extinction of the obligation which formed the subject of the submission;"

"7. By revocation in the case of the preceding article." C. C. P. 1348.

Arbitrators cannot be recused, except for reasons which have arisen or have been discovered since their appointment. C. C. P. 1349.

So where the submission charged the arbitrators to *faire leur rapport ou prononcer leur sentence arbitrale dans le cours des cinq semaines qui suivront le dit jour. vingt-quatre Juin courant*" and it was further stipulated that *il sera néanmoins loisible aux dits arbitres de prolonger à leur discrétion le temps qui vient de leur être assigné pour faire le rapport et la visite, si les circonstances le requièrent.*" The proceedings were adjourned by simple consent of parties to the 12 October, and the appellant then revoked the power: *Held*, that he had a legal right so to do, and that no action of damages would lie. *Foisy & Déry*. Q. Judgment reversing, 7 Sep. 1874, Monk, Taschereau, Ramsay, Sanborn, JJ. Taschereau J. diss.

Semble, that the power given to the arbitrators to prolong the delay indefinitely is similar in effect to finding no period within which the award shall be rendered.

And on the same principle commissioners to make an assessment for a special improvement cannot report after their powers are at an end. *v.* ASSESSMENT.

By a deed of submission it was stipulated that the award "should be made in writing, and duly deposited with the undersigned notary, within"—a fixed period. The arbitrators made their award before the notary in question, and directed that the award should not be communicated to the parties till their costs which they taxed at $738.59 were paid, and the award was not actually signified to the parties till after the expiration of the time fixed by the submission.

Held, reversing the decision of the Superior Court, that the stipulation in the deed of submission that the award should be in writing, and should be deposited with a certain notary, was a waiver of the formalities of art. 1352 C. C. M. with regard to the service of the sentence on the parties, and that the prohibition to communicate the contents of the award, until the claim of the arbitrators for their fees was paid,

was usual and such an order as the arbitrators were entitled to make. *Normand & McGreevy*, Q. Judgment reversing 8 June, 1887. Dorion, C. J., Monk, Sanborn, Tessier, JJ. Ramsay, J., *held*, dissenting, that the directions of the submission were only a reference, in general terms, to the article 1352 C. C. P., and instead of being a waiver of the dispositions of that article, were a recognition of them; and that the order of the arbitrators not to communicate the sentence until their pretended fees were paid, was virtually a renunciation of the performance of the duties imposed upon them, and was, in effect, a failure to render their award.

Difficulties between co-partners were referred to arbitration. The arbitrators it appeared, acted irregularly, the Defendant was not duly notified, the witnesses were not sworn. The Defendant, now Appellant, took advantage of the award in so far as to take possession of some of the goods and turned them to his own account, protesting at the same time against the irregularities of the arbitrators. *Held*, that he had acquiesced in the award, knowing the objection to it, and that he was bound to abide by it. *Lepine & Fiset*, Q. Judgment confirming 8 Sep., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 10 Rev. Lég. 153.

Where arbitrators have valued the land as a whole, and not for so much by measurement, an error in the extent will not invalidate the award. And the rendering of professional services as a notary, habitually, does not disqualify such notary as arbitrator to the person to whom such services are rendered. And in any case where the arbitrator or one of the parties not personally interested, might have been recused, and the ground of recusation was known to the other party, and he acquiesced in the award, this ground of recusation is not sufficient to make the award null. *The North Shore Railway Co. et les Ursulines de Québec*, Q. Judgment confirming 8 October, 1884.

Arbitrators named to assess damages

done by the works of a railway company to a stone-quarry, cannot, by their award condemn the railway company to alter their works or to pay an annual and perpetual rent to the lessee of the quarry. *The Montreal, Ottawa & Occidental Railway Co., & Bourguignon*, M. Judgment reversing 14 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Tessier, J., diss., Rep. 25 J. 96, 9 Rev. Leg. 631, 2 Leg. News 131.

The Court, may of its own motion, refer to the decision of arbitrators any case of dispute between relations, concerning partitions, or other matters of fact which it is difficult for the Court to appreciate, art. 341 C. C. P. *Robert & Robert*, M. Judgment confirming 22 Dec., 1876. Dorion. C. J., Monk, Ramsay, Sanborn, JJ., Tessier, J., dis., Rep. 21 J. 18.

ARPENTEUR.—An *arpenteur* was an officer appointed to measure lands. Ferrière *verbo* Arpenteur. See also Montigny "Histoire du droit français," p. 582, for an account of the office. Now "no person shall act as a Surveyor of lands within this Province (the late Province of Canada), unless he has been duly authorized to practise as a land Surveyor according to the provisions of this act (18 Vic., c. 83), or had been so authorized before the passing hereof, to wit of said act) according to the laws then in force." C. P. C., c. 77, sect. 5. But see 39 Vic., c. 34, Q. 43 et 44 Vic., c. 23, Q. 45 Vic., c. 16, Q. 46 Vic., c. 35. Q. Surveyors of Dominion lands. 35 Vic, c. 23, (Repealed). 39 Vic., c. 19 (Repealed). 42 Vic., c. 31. *V.* BORNAGE.

ARREARS.—Are what is overdue of any revenue or rent. (1)

ASSESSMENT.—Primarily the valuation of property for the purpose of taxation; it is also used for the amount assessed.

(1) NOTE. To this the learned judge had added a query as to Aliments, and referred to a case on the subject as then before the court but does not say what case. Ed.

When an assessment roll is illegally made, more particularly when it is made with the fraudulent intent of overcharging a certain class of rate-payers, the Court will on petition prohibit the execution of process by the Corporation to levy a tax under such roll. *Morgan & al. & Coté & al.* M. Judgment June 22, 1880. Monk, Ramsay, Cross, JJ., Dorion, C. J., and Tessier, J., dis. And where parties have paid a tax under such circumstances, an action will lie to recover it back, and to set aside such assessment roll. *Lussier & Corporation of Village of Hochelaga.* M. Judgment 22 June, 1880. Monk, Ramsay, Cross, JJ., Dorion, C. J., and Tessier, J., dis, and in another case of *Valois & Corp. of Hochelaga.* Rep. 2 Leg. News, 274.

An assessment may be set aside in the Circuit Court if it appears to have been made without regard to the direction of laws established as necessary for the protection of the rate-payers. And an appeal will lie to the Court of Queen's Bench from any judgment of the Circuit Court in such matter. *Rolf & al. & The Corporation of the Township of Stoke.* M. Judgment reversing the judgment of the Circuit Court 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J., 103. 3 Leg. News, 69.

The same question is decided in the case of *McLaren & al. & The Corporation of the Township of Buckingham.* M. Judgment reversing, June, 1875. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ.

The County Corporation cannot bring a direct action against an individual rate-payer for a County rate. Its action is against the municipality. *Roberge & Corporation of County of Levis.* Q. Judgment reversing, 5 December, 1876. Monk, Ramsay, Sanborn, Tessier, JJ., Tessier, J., dis.

The property of a railway company existing under Dominion legislation, may be assessed under a local act by the corporation of the municipality through which it passes, for a special

rate to form the sum of money subscribed by such municipal corporation for the purchase of stock in another railway company.

The failure to deliver to the secretary treasurer the valuation rolls in the month of June, in the year in which it was made, does not invalidate such roll. Section 66, 36 Vic., chap. 60, is only directory. *The Grand Trunk Railway Co. of Canada & The Corporation of the Town of Levis.* Q. Judgment confirming, 7 March, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 612.

An assessment roll, (to defray the cost of an improvement), which is not completed until after the powers of the commissioners expire, is absolutely null. *The Mayor &c. of the City of Montreal & Hubert,* M. Judgment confirming, June, 1876. Sir A. A. Dorion, C. J., Ramsay, Sanborn, Tessier, Bélanger, JJ. and also in a case of the same corporation against Stephens, and against Barron, and against Pinsonsonneault *et al,* and against Sutherland and so also where the commission did not report until after their powers expired, the assesment roll was null. *Baylis The City of Montreal,* M. Judgment reversing, 22 Sep., 1879, Sir A. A. Dorion, C. J., Monk, Ramsay and Tessier, JJ. Te-sier, J. dis. Rep. 23 J. 301. 2 Leg. News 340. 10 Rev. Leg. and also see *Bisson & The City of Montreal,* M. Judgment reversing, 22 Sep., 1879. Rep. 23 J., 306, 2 Leg. News 340, 10 Rev. Leg. 100.

And where an action was brought to have an assessment roll to defray the cost of an improvement declared null and void, and, after the institution of the action, Plaintiff had paid the amount for which he was assessed, in order to be relieved from an execution which had issued against his effects, such payment was not an abandonment of his right to have the roll declared null and void as far as he was concerned for he paid under compulsion, and did not acquiesce. *Bisson & The City of Montreal,* M. Judgment reversing, 22 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ., Tessier, J. dis. Rep. 25 J. 306. 10 Rev. Leg. 100. 2 Leg. News 341.

ASSESSMENT.—Special. Where it was stipulated in a deed of sale that the purchasers should retain an amount to pay the Corporation of the City of Montreal a certain sum as a special assessment for an improvement, in case the proceeding in expropriation, then being contested were maintained, and the corporation abandoned said proceedings, the vendor may recover the sum so retained; and it is no answer in the mouth of the purchaser that to say. that the corporation has obtained power to make a new assessment.

But the power to make a new assessment is a *trouble de droit* and gives the purchaser the right to demand security. *Chabot & La Banque Jacques-Cartier.* M. Judgment reversing. 20 Sep., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

And it is not necessary for the Plaintiff to produce the assessment roll if the whole facts are admitted. *Baylis & The City of Montreal,* 23 J. 301. And also *Bisson & The City of Montreal,* 12 Rev. Leg. 100.

ASSIGNEE.—*v.* APPEAL.—INSOLVENCY.

ASSOCIATION.—*v.* CORPORATION.

ASSUMPSIT.—Is a voluntary promise made by word, by which a man assumes or takes upon him to perform or pay anything to another. Termes des Legs, *v.* ASSUMPSIT, Tomlins Law Dictionary, *Ib.*

An action simply for work and labour will not lie in favour of a person who has worked for a company, against the person who ostensibly acted for the company in employing the Plaintiff, although the company had no legal existence, if it appear that Plaintiff knew how matters stood. *Guimond & Grondin,* Q. Judgment confirming 8 Sep. 1881.

Evidence of a *quasi* contract will not

support an action in the assumpsit form. for goods sold and delivered. *Ryder & Vaughan.* Judgment confirming 12 Nov. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 3 Leg. News 391, 1 Dec. d'A. 19.

ATERMOIEMENT.—A kind of arrangement by which a debtor obtains from his creditor delay, and sometimes remission of part of what he owes, called in the "Code de Commerce" *Concordat.* Merlin, *v.* ATERMOIEMENT, —COMPOSITION.

ATTORNEY.—Is a *mandataire*, *v.* ADVOCATE & ATTORNEY, MANDATE. C. C. 1732.

Attorney is one appointed by another to do something in his stead. "Terms of the law."

The mandate of the attorney or procureur *ad litem* differs in some important particulars from that of the mandatory *ad negotium.* Poth. Tr. du Contrat de Mandat, No. 123.

ATTORNEY GENERAL. — Attorney general in England is a great officer under the King, made by letters patent. Tomlins Dict. In Canada, since confederation, "The Minister of Justice is *ex-officio*, Her Majesty's Attorney General for Canada, 31 Vic., c. 39, sect. 1. His powers and duties as such Attorney General, sect. 3. There is also an officer of the Province of Quebec called "the Attorney General," appointed under the great seal of the Province, "British North America Act, 1867," sect. 134.

The right of the Attorney General for the Province of Quebec to appear for the Crown cannot be questioned by a private person. *Monk & Ouimet*, Atty. Gen. *pro Reg.* M Judgment reforming December, 1874. Dorion C. J., Taschereau, Ramsay, Sanborn, Sicotte, JJ., Rep. 19 J. 71.

The Attorney General for the Province of Quebec claimed precedence for the hearing of his case as a privilege. The Court without adjudicating on the right allowed the special case to take precedence as it was a matter of general public interest. *The Atty. Gen. & The Queen's Ins. Co.*, M. Judgment 11 June, 1877.

Attorney General *v.* BY LAW.

AUCTION.—*v.* SALE BY AUCTION.

AUCTIONEER.—Is a person licensed to sell by auction and outcry in the Province of Quebec. 41 Vic., C. 3, Sect. 2 sub. sect. 6.

Question as to the right of auctioneers over property entrusted to them for sale. The decision turned on evidence solely, it being held, confirming the judgment of the Superior Court, that the auctioneer had not proved that the property was entrusted to him for sale; and that he had advertised the property for sale without instructions of any kind. *Booker & Craig. es qualité.* M. Judgment. September, 1875. Dorion, C. J. Monk, Taschereau, Ramsay, Sanborn JJ.

AUTHORISATION TO SELL EN JUSTICE. *v.* SALE EN JUSTICE.—What authorisation covers.

AVAL. Est le cautionnement de celui qui se rend caution dans une lettre de change pour le tireur, ou pour quelque endosseur, ou pour l'accepteur; la forme est que la caution met sa signature au bas de celle pour qui il se rend caution." *Pothier Tr. de contrat de change*, No. 50. *v.* PROMISSORY NOTE.

AVERAGE.—Is a charge which accrues during a voyage and falls sometimes on the merchant, sometimes on the owner and sometimes on both. Whatever damage or loss is incurred by any particular part of the ship or cargo, for the preservation of the rest is called *general average. Smith, Mer. Law.* 401. *v.* SHIPPING.

AVEU. *v.* ADMISSION.

AWARD.—Is the name given to the decision of arbitrators. *v.* ARBITRATION AND ARBITRATOR.

B

BAIL.—*v.* CAPIAS.—CRIMINAL LAW.

BAIL.—*v.* EMPHYTEUSIS—LEASE.

BANKING.—" Banking, incorporation of banks, and the issue of paper money " and also " Savings banks, " are within the legislative authority of the Parliament of Canada. B. N. A. Act, 1867, Sect. 91 ss. 83, 15 and 16. Banking is regulated by the charters of banks and by special statutes. 1888 C. C. " All corporations are prohibited from carrying on the business of banking unless they have been specially authorized to do so by their title of creation. " The statutes respecting banking, from confederation up to the 42 Vic., c. 45 (1879), are enumerated in " the Reference Book " by Mr. Dubreuil. Since then the Parliament of Canada has passed : 1880 " an act to amend an act relating to Banks and Banking and to continue for a limited time the charters of certain banks to which the said act applies. " 43 Vic., c. 22," an act respecting certain Savings Banks in the Provinces of Ontario and Quebec. " Cap. 23, 1882. " An act respecting insolvent Banks" &c., 45 Vic., cap. 23, 1883, " An act further to amend an act entitled : " An act relating to Banks and Banking, and the several acts amending the same. " 46 Vic., c. 20. " An act to amend an act repecting insolvent banks" &c. 46 Vic., c. 23.

A bank taking security from a firm, for the renewal of notes of which such firm was endorser for credit, and which notes were those of a party insolvent were over due, does not give rise to a presumption that the firm endorser was insolvent or contemptated insolvency. *Stadacona Bank & Walker, esqual.* Judgment reversing, Sir A. A. Dorion, C.J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 381.

The cashier of a Bank, who has endorsed notes for a customer of the Bank, may, if in good faith, take a hypothec on the debtors property to protect himself on the endorsements. *Thibaudeau et al. & Beaudoin.* M. Judgment reforming, 22 June, 1885. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 3 Leg. News 306.

The customer of a bank bought a quantity of wheat for cash, and obtained delivery promising immediate payment. Being remonstrated with by one of the officers of the bank for having overdrawn his account, and being pressed for immediate settlement, he drew a bill on England, and attached to it the bill of lading for the unpaid wheat. The bank discounted the bill, and placed it to the customer's credit, where it extinguished his indebtedness, he never having had possession or control of the proceeds. The bill was not paid in England, and the wheat was sold for the profit of the bank. Appellant sued the bank for the proceeds of the sale on the ground that the bill transaction was fraudulent, and was only a covert mode of avoiding the terms of the Banking Act, and obtaining the payment of an over-due debt :

Held confirming the judgment of the Superior Court, that the transaction was legitimate. *Denholm & the Merchants' Bank.* M. Judgment, 22 June 1877. Dorion. C. J., Monk, Ramsay. Sanborn, JJ. Ramsay, J. dissenting was of the opinion that the evidence established that the bill of lading was transferred to cover a past due debt, that the officers of the Bank knew that the wheat was unpaid, and that the bill transaction was simulated and unreal : that the customer never had possession and control of the pretended proceeds of the Bill of Exchange, and that the Bank never, in effect, paid anything for said bill ; and therefore that the whole transaction was in fraud of the Banking Act. That the Appellant might have stopped the wheat in *transitu*

and that not having done so, he lost his recourse against the wheat, but not against the customer of the Bank or his confederate.

Reynolds Bros, shipped from Toledo, a port in the United States, 16,500 bushels of wheat by schooner to Kingston, Ont., the cargo to be delivered as per address in the margin of the bill of lading as follows:—"Order Reynolds Bros.; notify Crane & Baird, Montreal, P. Q., "Care of St. Lawrence & Chicago Forwarding Co.," implying that, although the voyage of the schooner ended at Kingston, the cargo was to be put in charge of the Forwarding Company, destined for Montreal, Crane and Baird to be put upon their diligence by notice for any interest they might have in the cargo. The schooner having arrived at Kingston, the Forwarding Company, the ordinary carriers for Crane and Baird, received the cargo and paid the lake freight to the master of the schooner. No new bill of lading was issued, but the agent of the Forwarding Co. at Kingston, signed a receipt for the cargo across the face of the duplicate of the bill of lading. The respondents made advances on the original bill of lading endorsed by the shippers, but the wheat had been previously delivered by the Forwarding Company at Montreal to the order of Crane and Baird, without the surrender of the original bill of lading.

The question was whether the Appellants, the Forwarding Company, were held to the same obligations as if they had been signers of the original bill of lading, which the respondents contended had force and effect until the cargo reached its destination in Montreal, and whether the appellants as forwarders were bound to have demanded and secured the surrender of the original bill of lading on delivery by them of the cargo of the consignees.

The bill of lading was fulfilled, and became effete by the delivery of the wheat at Kingston, prior to the assignment of the bill of lading to the Respondents.

The negociability of a bill of lading cannot be put upon precisely the same footing as a bill of exchange. An advancer on a bill of lading should exercise reasonable diligence as regards the cargo it purports to represent.

The alleged usage of trade, imposing the obligations incurred under the first bill of lading upon the carrier who accepts a cargo carried to an intermediate port to forward it to its final destination by an additional transit, so as to require such ultimate carrier to procure the surrender of the original bill of lading to free himself from responsibility, could not alter the established significance of the documents used, or the legal relations of the parties according to the facts of the case, or make liability depend upon obtaining the surrender of a document after it had exhausted its efficiency and ceased to have any operation. *The St. Lawrence and Chicago Forwarding Company & The Molson Bank.* M. Judgment reversing, 21 May, 1884, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ, Monk, J. dissenting. Reported M. L. R. I. Q. B. 75, 4 dec. d'A. 16, 7 Leg. News, 367.

Banks cannot acquire a lien on logs under the banking act (34 Vict. c. 5, s. s 46 and 47), if the pledge of these logs was made for a previous indebtedness, or if they were not held by virtue of a transfer of a receipt by a covekeeper, or by the keeper of any wharf, yard, harbour or other place, or of a specification of timber deposited in a cove, wharf, yard, harbour, warehouse, mill or other place in Canada, within the meaning of the said act.

To acquire a lien under articles 1745, 1966 and 1967, C. C., there must be an actual delivery or possession of the property pledged, or of some document in use in the ordinary course of business, entitling the bearer thereof, to claim possession of such property. *Ross et al. & The Molson Bank*, Q. Judgment reversing, 8 March, 1881, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Rep. 2 Dec. d'A. 82.

A bank taking a transfer of shares as collateral security is not liable as a stock-holder for calls on such shares. *The Railway and Newspaper Advertising Co. & The Molson Bank.* Judgment confirming, 14 June, 1879, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 207.

The transfer of shares of a bank, made in fraud of the Bank, may be set aside although the transfer have been accepted by the bank, provided such shares are held *à titre gratuit* by the nominal transferee. *Walsh & The Union Bank of Lower Canada.* Q. Judgment confirming, 4 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Under 37 Vict., c. 5, s. 34, there must be an interval of thirty days between the making of calls on stock, as well as an interval of thirty days between the dates fixed for payments. *La Banque d'Hochelaga & Robertson.* M. Judgment confirming, 27 Sep., 1883. Monk, Ramsay, Tessier, Cross, JJ., Monk, J., dis. Rep. 6 Leg. News, 307.

Bank shares cannot be seized by saisie-arrêt. *Hudon & al & Painchaud.* M. Judgment confirming. June, 1875. Monk, Taschereau, Ramsay, Sanborn, Bélanger, JJ.

Indictment under banking act for making a willfully false and deceptive return. Verdict quashed on reserved case, Dec. 20, 1879. *Reg. & Hincks.* Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

BANKING.—Misclassification is not matter of law, but of fact for the jury. *Ib.* Rep. 2 Leg. News 421. 24 J. 116.

V. DEPOSIT IN BANK.—WAREHOUSEMAN.

BEACH.—"Navigable and floatable rivers and streams and their banks, the sea-shore, &c., are considered as being dependencies of the Crown domain. 400 C. C.

The beach of a navigable river is not conveyed by an ordinary title of concession from the Seignior, and it remains part of the public domain.

The owner of the land facing the beach cannot contest the validity of Letters Patent of the government of Quebec conveying right over the beach of which he is not in possession. *Motz & Carrier.* Q. Judgment confirming, 7 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

BET.—"Of gaming contracts and bets." There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet. But if the money or thing have been paid by the losing party he cannot recover it back unless fraud be proved. 1927 C. C.

The denial of the right of action declared in the preceding article is subject to exception in favor of exercises for promoting skill in the use of arms and of horse and foot races and other lawful games which require bodily activity or address. Nevertheless, the Court may, in its discretion, reject the action when the sum demanded appears to be excessive. 1928 C. C.

A cheque given for a bet may be recovered by the innocent holder to whom it was delivered long after its date. *Ladouceur & Morasse.* M. Judgment 20 Sep., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. The Chief Justice and Ramsay, J., dis., were of opinion that a cheque was not payment, concurring in this with the majority of the Court, and that the party taking the cheque could not recover on it, and that the party receiving it long after its date was in no better position.

Time bargains are not necessarily illegal, nor does the law refuse transactions intended to be fulfilled, although it may happen, contrary to the expectation of the parties, that they are not really carried out as comtemplated, but from unforeseen causes come to be settled by differences. But if, in contemplation of the parties, they are at their inception intended to be speculative

transactions, to be settled by adjustment of prices according to the rise or fall of the market, and not by delivery of the subjects bought or sold, they become gambling transactions, and, under C. C. 1927, there is no right of action for the recovery of money claimed thereunder.

Where brokers act for a person contracting as above to deliver grain at a future date (but without intention to make actual delivery), and the brokers, having full knowledge of the fictitious character of the transaction, disclose no purchaser or principal, they will be considered as principals, as regards the party contracting to deliver, and no action will lie by the brokers for the recovery of a deficiency upon the transactions. *MacDougall & al. & Demers.* M. Judgment confirming, 22 March, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Monk, Ramsay, JJ., dissenting. Rep. M. L. R. II Q. B., 170. 4 Dec. D. A., 380. 9 Leg. News, 202.

Held, that there was no evidence to show that the contract was not to deliver, that the broker through whom an agency bargain is made is not by law deprived of the right to recover advances made to his principal, although he knew the nature of the bargain in which it was to be employed, because gambling is not an illicit contract. It is only a contract discouraged by the law, and the disability attached to it by the positive terms of the law cannot be extended inferentially. *Ib.*

BETTERMENTS.—A sale of betterments by a person only in possession of real estate, without warranty, gives no action to the purchaser who is evicted. *Dubois & Croteau.* Q. Judgment reversing, 5 Dec., 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg., 245.

BIDDER.—*v.* SALE.

BILL OF COSTS.—*v.* ADVOCATE AND ATTORNEY.—INSOLVENCY.

BILL OF EXCHANGE & PROMISSORY NOTES.—"A bill of exchange is a written order by one person to another for the payment of money absolutely and at all events." 2279 C. C.

It is essential to a bill of exchange:—That it be in writing and contain the signature or name of the drawer.—That it be for the payment of a specific sum of money only.—That it be payable at all events and without any condition, 2280 C. C. "The acceptance must be in writing upon the bill or upon one of the parts of the bill." 2292 C. C.

"A promissory note is a written promise for the payment of money at all events and without any condition. It must contain the signature or name of the maker and be for the payment of a specific sum of money only. It may be in any form of words consistent with the foregoing rules." 2344 C. C.

"Bills of exchange and promissory notes" are subject to the legislative authority of the Parliament of Canada.

A note given to a Building Society as collateral security is not a negociable instrument, and if lost does not fall within the terms of article 2316 C. C. as to security. *Cooley & The Dominion Building Society*, M. Judgment reversing, 18 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 24 J. 111, 1 Leg. News 495.

The contract expressed on the face of a negotiable instrument cannot be varied without an express agreement. Knowledge that the parties to a note occupy between themselves a relation different from that expressed on the face of the note, is not sufficient to alter their relations to a third party having such knowledge.

Giving notes for a previous debt does not operate novation unless the intention be evident. *Scott & La Banque de Québec*, Q. Judgment confirming, 8 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 7 Leg. News 343.

The presumption is that the endor-

sers of a promissory note are liable according to the order of endorsation, but this presumption may be repelled by evidence that such was not the intention of the endorsers. *Léveillé & Daigle*, M. Judgment confirming, 17 Sep., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Dec. de la C. d'Ap. 129.

Order of names on notes not conclusive as to the relative responsibility of the parties. *Léveillé & Daigle*, M. Judgment confirming that in Review, 17 Sep. 1880. Dorion, C. J., Monk, Ramsay, Cross, JJ.

A note indorsed for the accommodation of the maker is sufficient to allege that the note passed from the maker to the several successive endorsers for value received, without the declaring upon it as having been endorsed by the several indorsers as sureties of the maker.

The several successive indorsers of a promissory note, indorsed for the accomodation of the maker, are liable to each other in the order of their respective indorsements, the same as if the indorsements had been for value received, unless there be an agreement to the contrary.

Such an agreement which is to destroy the legal effect of a written instrument can only be proved according to the rules of evidence laid down in articles 1234 & 1235 of the Civil Code. *Whitfield & McDonald*, M. Judgment reversing, 23 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 2 Dec. d'A. 157. (1)

The Defendant must establish clearly that a note is given for accommodation. *Parker & Fuller*, M. Judgment, confirming, Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier JJ. Monk J. dis.

The maker of a promissory note, who pretends the note is for accommodation of holder, must show clearly that such holder gave no value for it. *Morehouse & Burland.* M. Judgment confirming, 25 February, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn JJ.

The Defendant, endorser, being sued on a promissary note, pleaded that he had endorsed for credit, and that the plaintiff (a subsequent endorser) had guaranteed the prior endorsers that he would see the note paid. *Held*, not proved, it appearing among other things, that the defendant had, by a letter to plaintiff, personally guaranteed due payment of the note in question. *Willett & Court.* M. Judgment confirming, 20 Jan., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby JJ. Rep. 6 Leg. News 204.

Where a defendant pleads that promissory notes were given in exchange for the one sued upon the burthen of proof is on defendant; he may, however, prove by parol the consideration of the note, and that it formed part of other transactions. *Temple & Jones.* M. Judgment confirming, 20 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Where an indorser suing a prior indorser on a promissory note alleges that the note came into his hands by delivery to him by such prior indorser, and it turns out that the note never was so delivered to him, but that he and such prior indorser were accommodation indorsers, the plaintiff will, nevertheless, be entitled to recover judgment in his favor without amending his declaration.

The right so to recover from the prior indorser is not affected by the mere fact that plaintiff and defendant were only accommodation indorsers, in the absence of any proof of an agreement between them that they were to be only jointly and equally bound. And the *onus probandi* is on the party pleading such agreement.

In the present instance no agreement was proved that the relations of

(1) NOTE.—This case was reversed in the Privy Council.

the indorser and indorsee were to be other than those mentioned in art. 2314 of the Civil Code. *Whitfield & McDonald.* M. Judgment reversing, 23 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 26 J., 69.

Where a promissory note is given for value. it is no answer to an action on the note that the value was not given by plaintiff. *Rollin et al., & Boyce.* M. Judgment confirming, December, 1875, Dorion, C. J., Monk, Ramsay, Tessier, JJ.

Where several persons, trustees of an insolvent estate under a deed of composition, which gave them no power to draw or accept bills, signed promissory notes with the words "Trustees to estate C. D. Edwards," after their signatures. they were personally and jointly and severally liable, and this particularly when the credit was given to them. *Archibald et al, & Brown et al.* M. Judgment confirming 22 Dec. 1879, Dorion, C. J. Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 85, 3 Leg. News, 43.

The possession of a promissory note gives rise to the presumption that the holder is owner, unless the possession be otherwise explained. *Cruice et al., & Desnoyers.* M. Judgment confirming, December, 1875, Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

Where a promissory note is surrendered to one of the Defendants, the presumption is that it is paid, unless some other reason be established to prove why it was given to the Defendant. *McKenzie & Frizzell,* M. Judgment confirming, June 1874, Taschereau, Ramsay, Sanborn. Loranger, JJ.

Presumption from return of the note to the drawer is only a presumption of payment which may be destroyed by contrary evidence. In a commercial matter evidence may lie by witnesses. *Grenier & Pothier,* Q. Judgment confirming, December, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Ramsay, J., dissident on

the ground that Plaintiff had failed to prove that the return of the note was not a remission of the debt. Rep. 1 Leg. News 33, 3 Q. L. R. 377.

A promissory note which is not in the hands of the Plaintiff must be accounted for. *Burland & Moorhouse,* M. Judgment confirming, 20 February, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a party sues on a note as being in his possession without producing it, he cannot recover judgment thereon, even if he proves that the note once existed, without proving that the Plaintiff ever had possession of it. *Raymond & Larocque.* M. Monk, Ramsay, Sanborn, Mackay, Torrance, JJ. Rep. 20 J. 175.

A Municipal Corporation will be condemned to pay the amount of a promissory note signed by the Mayor and Secretary-Treasurer in the name of the Corporation, where it is neither alleged nor proved that the note was given without lawful consideration. *The Corporation of the Township of Grantham & Couture et al.* M. Judgment confirming, 16 Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 105, 2 Leg. News 350, 10 Rev. Leg. 186.

In the absence of a special denial, the authority of officers of an incorporated Company to make notes will be presumed, and also that the note was given for consideration. — Affixing double stamps in Appeal. *La Société de construction du Canada & La Banque Nationale.* M. Judgment confirming, 16 March, 1880, Dorion. C. J., Monk, Ramsay, Cross, Caron, JJ. Rev. 3 Leg. News, 130. 1 Dec. de la C. d'Ap. 173.

A negotiable promissory note made by a Building Society, or other corporate body, not specially authorized by its charter to make promissory notes, is a promise held out to the public that it will pay the amount to the order of the person named therein, and will be held good as an acknowledgement of indebtedness; and the en-

dorsee of such note may recover the amount thereof from the Corporation, promissor, on the mere production of the note, in the absence of proof denying the existence of the debt or that valid consideration was received by the Corporation.

The authority of the Officers of an incorporated Company to make a promissory note, which is signed on behalf of the Company by the President and Secretary, will be presumed in the absence of a special denial that they were duly authorized.

A party in good faith will be allowed to affix double stamps to a promissory note even when the case is in appeal. *La Société de Construction du Canada & La Banque Nationale.* M. Judgment confirming, 16 March, 1880, Dorion, C. J., Monk, Ramsay, Cross, Caron, JJ., Rep. 24 J. 226.

Where an Insurance Company, without any reservation, accepts a promissory note of the insured for the amount of the premium, payment whereof is acknowledged by the policy to have been received, the failure of the insured to pay the note at maturity does not affect the validity of the insurance. *La Compagnie d'Assurance des Cultivateurs contre le Feu, &c., & Crammon.* M. Judgment confirming, 17 Dec., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 Jurist, 82. 3 Leg. News, 19.

A promissory note given by the insured may be a valid payment of the premium although the note be unpaid. So where an agent took a premium by note for $6.65—which he undertook to pay for the insured—and sent the note to the insurance company who issued a policy on the representations of the agent, without any reference to the insured, and the note was not paid by the agent till after the fire, the insurance company will be held liable on the policy. *The Ottawa Insurance Company & Boutiqué.* M. Judgment confirming, 22 Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News, 394.

A general power to act as agent does not give authority to sign a promissory note, even though the agent had authority by the power to hypothecate the real estate of the principal. *St. Jean & The Metropolitan Bank.* M. Judgment reversing, 16 Sep., 1876. Monk, Ramsay, Sanborn, Tessier, Bélanger, JJ. Rep. 21 J. 207.

Bona fide Holder.—The holder of a promissory note for value can recover on the note against the endorser, although the agent to whom he transmitted the note delivered it against his instructions, without the accomplishment of a condition which the endorser had stipulated with the drawer, but to which the plaintiff was not privy. *Sylvain & Flanagan.* Q. Judgment confirming, 8 March, 1875. Dorion, C.J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A note made fraudulently by a partner in the partnership name, binds the partnership in the hands of a *bona fide* holder for value. *Walter & The Molsons Bank.* M. Judgment confirming, 18 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

Where a note is indorsed for the accommodation of the maker it is sufficient to allege that the note passed from the maker to the several successive indorsers for value received, without declaring upon it as having been endorsed by the several indorsers as sureties of the maker.

The several successive indorsers of a promissory note, endorsed for the accommodation of the maker are liable to each other in the order of their respective indorsements, the same as if the indorsement had been for value received, unless there be an agreement to the contrary.

Such an agreement which is to destroy the legal effect of a written instrument can only be proved according to the rules of evidence laid down in articles 1234 and 1235 of the Civil Code. *The Merchants' Bank of Canada & Whitfield & Whitfield & McDonald.* M. Judgment reversing, 23 Sep., 1881.

Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 2 Dec. d'A., 157. 26 Jurist, 69.

A note payable on demand given to a bank to secure an overdrawn account of the maker, as well as to secure the forbearance of the bank for other advances, must be considered in the light of a continuing guarantee, and that the endorsers of such a note are not relieved from their liability by the fact that the bank did not make a demand of payment till after the insolvency of the maker, about twenty-seven months after the date of the note. *The Merchants' Bank & Whitfield.* M. Judgment reversing. 23 Sep., 1881. Sir A. A. Dorion. C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 2 Dec. d'A., 157.

The endorser of a composition note given by a debtor to his creditor in carrying out a settlement (not under the Insolvent Act) for fifty cents in the dollar, was not liable for the amount of such note, where it appeared that the debtor, for whom he endorsed the note as surety, and from whom he had taken a transfer of his estate as collateral security, had secretly given the plaintiff (the creditor) his own notes for the balance of his claim, in order to obtain his assent to the composition, and the creditor had already received fifty cts on his claim. *Arpin & Poulin.* M. Judgment confirming. 14 June, 1878. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ. Rep. 22 J. 331. 1 Leg. News, 290.

But the endorsers of composition notes for an insolvent remain liable thereon, though the discharge of the insolvent may have been annulled by the Court, and though the insolvent may have given other notes by way of preference to some of his creditors. *Marchand & al. & Wilkes.* M. Judgment confirming. 17 Sep., 1880. Sir A. A. Dorion, C. J., Monk. Ramsay, Cross, JJ., Ramsay, J., dis., thought this case involved the same principle as the case of *Arpin & Poulin.* The position of the endorsers was changed by the composition not being carried out, and Wilkes knew of the fraud. 3 Leg. News 318.

The endorser of composition notes is not discharged from liability thereon by the mere fact that the compounding creditors have secretly stipulated with the debtor that he shall pay them an amount in excess of the composition rate, as the condition of their consent to the composition and especially where the endorser, as the consideration of his endorsement, obtained a transfer of the insolvent's entire stock-in-trade and assets which he still retained when sued on the composition notes. But the endorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes. *Martin & Poulin.* M. Judgment reforming, 24 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Cross, J., dis. Ramsay, J., did not concur in some of the reasons given for the judgment; but concurred in the judgment because Poulin was in a peculiar position, and if he were discharged he would be really keeping what he had gained by the transaction and avoid his liability. Rep. 4 Leg. News 20 1 Dec. d'A. 75.

Notes given in excess of the settlement agreed upon with the other creditors of an insolvent cannot be recovered on, even if it appear that they were given to a consignor as the price of goods in the hands of the insolvent for sale. *Wilkes & Skinner,* M Judgment confirming 6 March, 1882. Monk, Ramsay, Cross Baby, JJ.

The drawer of a promissory note cannot set up, against the holder, the debt due to the endorser by the holder. In the particular case, no special understanding to alter the legal presumptions arising on the note is proved.

If a special understanding is to be proved all the parties should be present. *Donovan & al. & Darling.* Q. Judgment confirming, 5 Oct., 1883. Sir A. A. Dorion, C.J. Ramsay, Tessier, Cross, Baby, JJ.

A promissory note given without value and for a consideration erroneously believed to be good in law is not valid. *Riel & McEwen* M. Judgment rever-

sing, 29th September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Where a note is obtained by fraud and misrepresentation, and the holder does not show how it came into his possession or that he gave value for it, he will be presumed to have been aware of its fraudulent origin. *Robinson & Calcott*, M. Judgment reversing, September, 1875. Dorion., C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. *v.* "LA THEMIS," vol. 2, p. 331.

Where the transfer of a note by endorsement is made before it becomes due, but the evidence shows that the note was obtained from the maker by fraud and that the holder was aware of the fraud, the case does not come within the general rule laid down in C. C. 2287, and the onus of showing that he is in good faith falls upon the holder. *Bélanger & Baxter*. Q. Judgment reversing, 7th December. 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 6 Legal News, 413.

When a note is taken after it is due the party obliged by it may set off any matter such party could legally set off against the previous holder of the note, (2287 C. C.) *The Quebec and Gulf Ports Steamship Company & The Amazon Insurance Co.* Q. Judgment confirming, 8th Sep., 1877. Dorion, C. J., Monk, Ramsay, Bossé, JJ.

A note transferred for valuable security and not endorsed, implies a warranty that the maker is not insolvent to the knowledge of the transferrer. *Lewis & al. & Jeffery & al.* M. Judgment reversing, June, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A promissory note given by the Vice President of a company, for the private debt of the officer signing for the company, and with the knowledge of the Bank, holder of the note, that the note was given for such debt, cannot be recovered on by the bank, in an action against the company. *The Mechanic's Bank & Bramley & al.* M. Judgment

reversing, Sep., 20th, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, I was present at hearing but took no part in the *délibéré* and judgment. Rep. 2 Leg. News 389.

In an action against an accommodation endorser, where the note sued on showed on its face a manifest alteration of date, and the endorser pleaded such alteration, that the plaintiff (who had discounted the note for the maker) was bound to show that the alteration was made before the endorsation, or that it was made with the endorser's consent. *La Banque Ville-Marie & Primeau.* M. Judgment confirming, 19 Nov., 1880. Rep. 26 J. 20,1 Dec. C. d'Ap. 244. 4 Leg. News 19.

The defendant, sued on a promissory note, pleaded, in the first place, that the signature was a forgery, but subsequently amended his plea, and alleged that he signed the note by error, intending to give a receipt for the amount stated therein. *Held*, that in the case of an illiterate person who signed by making his mark, this change of defence was not an indication of bad faith, and the evidence appearing to the Court to sustain the amended plea, the judgment dismissing the action was confirmed. *Benoit & Brais.* Judgment confirming. 19th Sep., 1883. Rep. 6, Leg. News, 342. Sir A. A. Dorion, C. J. Monk, Ramsay, Cross, Baby, JJ.

The Defendant, endorser of a promissory note, pleaded that the notice of protest had been mailed too late. The evidence in support of the plea was that of the officers of the post-office, the letter showed by the stamping that it was posted a day too late. On the other hand the notary swore positively to the posting by his own hand. The Court was of opinion that the positive testimony of the notary was a stronger evidence than that of officers who swore to a practice. *Doutre & La Banque Jacques-Cartier.* M. Judgment confirming, 29th Jan., 1873. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Evidence of signature by endorser. Law of England. Competency of witness,

McLeod & The Eastern Townships Bank. M. Judgment confirming, 21 June, 1879.

The signature to a writing, which is denied, cannot be proved solely by comparison of the disputed signature with other signatures which are admitted or proved to be genuine.

Quære, as to the effect of illegal evidence taken without objection. *Paige & Ponton,* M. Judgment confirming, 19 March, 1877, Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 26 J. 155.

Forgery. Division *de l'aveu. Morin & Grenier,* M. Judgment reversing, 15 June 1877, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Question of evidence. *Semple & Jones.* M. Judgment confirming, 20 Jan. 1883, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

The short prescription referred to in articles 2250, 2260, 2261 and 2262 C. C. may be renounced and interrupted, in the manner prescribed by article 2227, C. C. *Walker & Sweet.* M. Judgment reversing, 21 December, 1876, Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 29.

The prescription of a promissory note does not commence to run until after the expiration of the last day of grace. *St-Marie & Stone.* M. Judgment confirming, 27 September, 1882, Sir A. A. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Leg. News 322, 2 Dec. d'A. 369.

L'appelant ayant été condamné par jugement de la Cour Supérieure, à payer à un nommé Francis McCaffrey le montant d'un billet fait à l'ordre de l'Intimé et endossé par ce dernier en faveur de l'Appelant :

Jugé, par la Cour d'Appel, infirmant le jugement de la Cour Supérieure :

1o. Que la demande en justice et le jugement par McCaffrey, contre l'Appelant, ont interrompu la prescription,

tant à l'égard de l'intimé qu'à l'égard de l'Appelant.

2o. Que pour recouvrer de l'Intimé les frais payés à son procureur par l'Appelant dans l'action intentée contre lui par McCaffrey, l'Appelant aurait dû appeler l'Intimé en garantie. *Hart & Beauchemin,* Q. Judgment reversing, 3 June, 1881, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 307.

A note was made payable at Plaintiff's house, but subsequently Plaintiff gave the note to his Attorney, and it was not in his hands to return it to Defendant, who, on suit. without any demand, paid the money into Court with his plea. *Held,* not liable for the costs of the action. *Lessard & Genest,* Q. Judgment confirming, 8 Oct. 1883, Sir A. A. Dorion, C. J. Ramsay, Tessier, Baby, JJ.

The request of a party who afterwards refuses to accept, may be recovered by the party who cashed it from the party who promised to accept.

The right of action in such case is not taken away by articles 2292, 2293 C. C.

That the letter promising to accept is addressed to the Defendants correspondent, but evidently given to be used to obtain funds from a banker, and which was so used, does not affect the banker's right to bring a direct action. *Dunspaugh et al. & Molsons Bank,* M. Judgment confirming, 22 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J, 57, 9 Rev. Leg. 624.

Lorsque la signature portée au bas d'un billet n'est pas suffisamment prouvée être celle du prétendu signataire, après négation sous serment de la part de celui-ci, l'action en réclamation du paiement dit billet sera renvoyée. *Boulanger & Walters.* Q. Judgment reversing, 6 May, 1886, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Cross, JJ., dissenting, Rep. 14 Rev. Leg. 359.

When a note bears on its face that it was given for value, the promissor is bound to prove that it was not so given. (2285 C. C.) And it is not proof that it was given without consideration, that the parties had many note transactions, and that Plaintiff cannot from memory, say of what transactions this was the result, or whether it was a renewal, and the ordinary presumptions of law are in no way altered by the fact that the maker and the holder had monetary transactions together connected with a general election of members to serve in Parliament. *McGreevy & Senecal.* M. Judgment confirming, 30 June, 1386, Sir A. A. Dorion. C. J., Ramsay, Tessier, Cross, Baby, JJ., Tessier, Cross, JJ., dis.

Where a promissory note is given for a Patent right for a new and useful invention, and the Patent is not for a new and useful invention, the vendor of the alleged note cannot recover. *Almour & Cable.* M. Judgment reversing, 27 March. 1886, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Lorsqu'un billet promissoire a été obtenu du prometteur, par dol, fraude et sans cause valable, le tiers-porteur de ce billet, ne pourra en recouvrer la valeur sans prouver qu'il a reçu ce billet avant l'échéance, de bonne foi et pour bonne et valable considération, ignorant les circonstances sous lesquelles il a été donné. *Dumas & Baxter*, Q. Judgment reversing, 6 February, 1885, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ., Rep. 14 Rev. Leg. 496.

Where a promissory note is given for value on the face of it, the Defendant must prove that it was not given for value. And it will not be a presumption that it was not given for value that the parties had another note transaction for election purposes, which is not shown to be connected with the note sued upon. *McGreevy & Senécal*, M. Judgment confirming, 30 June, 1886, Monk, Ramsay, Tessier, Cross, Baby, JJ.

BILL OF LADING.—*v.* AFFREIGHTMENT. —BANKING.—WAY-BILL.

BON.—*v.* ABSENTEE.

BONDS.—A bond given by a public officer for the due fulfilment of his duties with sureties, will bind him and his sureties towards any one suffering by his misfeasance in office, although it be not taken and acknowledged in the manner and according to the formalities of the 92 Cap. C. S.L. C., Sect. 3. *Blais & Gleason*, Q. Judgment confirming, 6 Sept., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dis. Rep. 6 Q. L. R., 202.

Upon the facts of the case the Court was of opinion that the Defendant (Appellant) was bound to return certain railway bonds which had been placed in his hands by the Plaintiff's assignor.

The condemnation against the Defendant, in default of returning the bonds, should be to pay the actual value thereof, as established in evidence, and not the par or nominal value. *Senécal & Hatton.* M. Judgment confirming, 9 December 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. M. L. R. I. Q. B. 112, 7 Leg. News 414. *v.* RAILWAY CASES.

BORNAGE.—"Every proprietor may oblige his neighbour to settle the boundaries between their contiguous lands.—The costs of so doing are common; those of the suit, in case of contestation, are in the discretion of the Court." 504 C. C. Whenever two contiguous lands have never been bounded, or the boundaries have disappeared, or the fences or boundary works have been wrongly placed, and one of the neighbours refuses to agree upon a surveyor to determine the boundaries or to verify or to rectify the division line, as the case may be, the other party may bring an action against him to compel him to do so." 941 C. C. P.

Where there never has been a boundary line between neighbours, and the question is simply as to *empietation* the proper remedy is by an action *en bornage*, and a petitory action will be dismissed. *Fraser & Gagnon.* Judgment

confirming 15 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Q. L. R. 381.

But where an action should be *en bornage* and the Plaintiff concludes *au pétitoire*, and the Defendant does not object but pleads over, and substantial justice is done by the judgment the Court of Appeal will not disturb it. *Atkinson & al, & Hall & al.*, Q. Judgment 7 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 192.

A line indicated by blazed trees, will not be sufficient reason for laying down the boundary line between the parties otherwise than in accordance with the title deeds of the parties. *Grenier & al, & Giroux*, Q. Judgment confirming 6 Sep., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Mr. Justice Sanborn heard the case in June but died before the Judgment was rendered. The Defendant who resisted the *bornage* will be condemned to the costs of the action. *Ib.*

A memorandum in the terms following, will not be considered as a Deed of Exchange or as affecting the original title of the property: "Whereas, it is *difficult building a division line fence* between Riley Wyman and Charles G. Libby, both of Barnston, in the county of Stanstead, in the Province of Canada, Farmers: We, the undersigned, Riley Wyman and Charles G. Libby, have agreed that the line between them on Lot No. 2, in the 3rd Range of Barnston aforesaid, shall commence on the West side of the river, at the division line between Hugh Odbert and the said Chas. G. Libby, about 12½ rods from the river at low water mark, running a little East of N. East to a poplar tree on the brink of the river, thirteen rods; thence across the river to the East side, thence down the river far enough from the river *to build a fence to be safe*, to a small spruce tree, spotted, and with a pile of stones; thence North-West 15 rods to a spotted birch, thence about North W. 13 rods, to a spruce tree on the bank of the upper end of the mill-pond; thence on said bank to the North end of said lot: the said line to be established as a division line of said lot between the parties."

That therefore either party is entitled to demand *bornage*, and in case of its being refused by the other party the costs of the suit, if successful, will be borne by the party refusing to be bound. *Libby & Wyman*, M. Judgment confirming March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Belanger, JJ. Taschereau, J., dis.

Possession by works in existence for more than ten years. *Laflamme & Lecompte*, Q. Judgment reversing 8 February, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Where the Defendant in an action of *bornage* contest the action unsuccessfully he will be condemned to pay the costs; and the costs of *bornage* will be borne equally by the parties

The Court by its Interlocutory judgment ordering a *rapport d'arpentage* is not obliged to name three *arpenteurs*. *Bouffard & Nadeau*, Q. Judgment confirming 5 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 321.

By the Interlocutory judgment of the Court, the *arpenteur* should be directed to report to the Court the State of the properties, and then it is the duty of the Court to decide where the boundary posts are to be placed, and the *arpenteur* is then ordered to place them according to the requirements of the judgment. And where, without consent of parties, a judgment orders the *arpenteur* to decide as to the lines of division and to place posts, and he does so, the proceedings will be set aside as irregular, although the Court may have, by its final judgment, homologated the proceedings. *Brown & Perkins*, 4 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 6 Q. L. R. 143, 10 Rev. Leg. 427.

In an action *en bornage* the Superior

Court ordered: "Que par un ou plusieurs arpenteurs nommés par les parties, il fût procédé au bornage des propriétés désignées dans la déclaration, conformément à la loi et aux titres et possession des parties, le dit arpenteur devant faire un plan figuratif des lieux, établir les lignes de division entre les propriétés respectives et y poser des bornes pour marquer et délimiter d'une manière légale et définitive les dites lignes de division entre les dites propriétés, dresser procès-verbal du dit bornage et faire rapport à cette Cour de ses opérations." In execution of this order two lines were drawn about twelve feet distant from each other. The Court below rejected the first report and adopted the second. But the Court of Queen's Bench *held*, that the order was irregular, inasmuch as it directed the surveyor to place *bornes*, without having decided by its judgment what was the line of division in which the *bornes* should be placed. That there was nothing in the record to establish where the line should be. And that therefore the Court should order a new *bornage*. It was *held* that the costs of an uncontested *action en bornage* should be at the joint charge of the parties. *Loiselle & Paradis*, M. Judgment reversing 26 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 1 Dec. d'A. 264.

Pour maintenir une action en bornage, il faut que le Demandeur prouve son droit de propriété ou au moins sa possession civile. *Mann & Hogan*, Q. Judgment confirming 7 Dec., 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 8 Q. L. R. 1, 11 Rev. Leg 334.

BRITISH NORTH AMERICA ACT 1867. —This is the Imperial Statute 30 Victoria, cap. 3, styled, "An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the government thereof, and for purposes connected therewith." Sanctioned 29th March, 1867.

In 1871, this act was amended by "An Act respecting the establishment of Provinces in the Dominion of Canada." 34 and 35 Victoria, cap. 28. Sanctioned 29th June, 1871.

In 1875, the act of 1867 was further amended, by "An Act to remove certain doubts with respect to the powers of the Parliament of Canada, under section eighteen of the British North America Act, 1867." 38 and 39 Victoria, cap. 38.

Section 41 of the B. N. A. Act, 1867, which provides for the "continuance of existing election laws until Parliament of Canada otherwise provides," and sect. 8 by which provides for the "continuance of existing election laws," are transitory clauses and only have force in the measure of their applicability. So a custom-house officer is not precluded from voting at a local election. *Hamilton & Beauchesne*, Q. Judgment confirming 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The powers of a local government under the B. N. A. Act, are co-extensive as regards the subject, with those of the local legislature, so a Provincial Government has power to incorporate by letters patent a company for the purposes of navigation within the limits of the Province. *Macdougall & al, & The Union Navigation Company*. M. 16 March, 1877, Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 63.

The Dominion Parliament had a legal right to impose on the Superior Court, and the judges thereof the duty of trying controverted elections of members elected to the House of Commons of Canada. *Bruneau & al, vs. Massue*, M. Judgment rejecting Appeal 18 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 60, 2 Leg. News 38, 9 Rev. Leg. 626.

An act of the Province of Quebec passed in 1872 (36 Vic., c. 12, sect. 3) limited the right of Appeal in certain cases that had gone to the Court of Review, and it was *held* that this controlled the right of appeal in cases of insolvency, and that it was not beyond

the powers of the local legislature to regulate by general rules the appeals to its Courts, provided such rules did not contravene a positive law regulating insolvency. *Studay & Angers*, M. Judgment, 1874.

The act of Legislature of Quebec, 32 Vict., cap. 15, sect. 190, authorizing the Lieutenant Governor in Council to declare forfeit (for default to make repairs) the right of collecting tolls on any toll-bridge and to transfer the property therein; was within the powers of the local legislature, and that the Orders in Council mentioned in this case forfeiting the right of exacting tolls for passing on a toll-bridge, which had been placed under the management of the Municipal Councils of Cleveland & Melbourne (Appellants) by Order of the Executive Council of the former Province of Canada, and transferring the control of the property to the Appellants, were not *ultra vires*. *The Municipality of the Township of Cleveland & al, & The Municipality of the Township of Melbourne & Brompton Gore.* M. 26 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 26 J. 1, 4 Leg. News 277, 1 Dec. d'A. 353.

La clause du Statut Provincial, 42-43 Vict., ch. 4, ordonnant la fermeture le dimanche de la maison dans laquelle il se vend des liqueurs spiritueuses, est une mesure disciplinaire et de police, et n'est pas *ultra-vires* de la Législature Provinciale. *Poulin & La Corporation de Québec*, Q. Judgment confirming, 7 Dec. 1881, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ., Rep. 7 Q. L. R. 337. 2 Dec. d'A. 103. Ramsay, J., thought the prohibition was improvidently issued independently of the special question of legislative authority.

Although the form of proceeding adopted in this case, viz., a rule for contempt against the Prothonotary, is an irregular mode of testing the constitutionality of a statute, and the right of appeal *de plano* from the order made by the Court below in such case might be questioned, yet where all parties have acquiesced in the form,

and have expressed a desire for a decision on the merits, the Court, in its discretion and where the question is of is of public interest, may overlook the technical difficulty and deal with the case on its merits.

The tax imposed by the Act of the Legislature of the Province of Quebec, 43-44 Vict. cap. 9, sec. 9, to wit, a duty of 10 cents on each exhibit filed before the Superior Court, etc., such duty payable in stamps, is in consideration of a service to be rendered by an officer of the Government of the Province of Quebec, and for a merely local object in the Province (viz., for the maintenance of the administration of justice in the Province): and, moreover the tax in question is of a nature similar to those collected prior to Confederation for the purpose of maintaining the administration of justice, which have always been treated as local assets, and consequently the Act in question was not *ultra vires*.

Quære, as to direct and indirect taxation. *The Attorney General & Reed.* M. Judgment reversing, 24 Nov. 1882, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 26 J. 331, 5 Leg. News 497, 3 Dec. d'A. 33. The Chief Justice dissenting. This case was reversed in the Privy Council.

A local Statute empowering a municipality to make by-laws prohibiting the sale of liquor, or allowing its sale under certain conditions, is not justified by sub-section 9, Section 92, B. N. A. Act of 1867, even though the municipality only exercises the power to the extent of fixing a tax by way of licence, and for the purpose of revenue.

The state of things existing in the confederated Provinces at the time of Confederation, and more particularly that which was recognized by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Imperial Parliament to indefinite expressions employed in the B. N. A. Act of 1867.

At the time of Confederation, the

right to prohibit the sale of intoxicating drinks, existed as a municipal institution, in the then Province of Canada, and in Nova Scotia, and conse quently that it is to be deemed a "municipal institution" within the meaning of sub-section 8, Section 92, B. N. A. Act of 1867.

The power of the Dominion Parliament to pass a general prohibitory liquor law as incident to its rights to legislate as to public wrongs, is not incompatible with a right in the Provincial Legislatures to pass prohibitory liquor laws as incidental to municipal institutions. *The Corporation of Three Rivers & Sulte.* Q. Judgment reversing, 7 Oct. 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 5 Leg. News, 330. This judgment was confirmed in the Supreme Court. Rep. 11 S. C. R. 25.

A Statute of the Legislature of the Provihce of Quebec (39 Vic. c. 7) enacted (Sect. 1) that "every assurer, carrying on in this Province, any business of assurance, other than that of marine assurance exclusively, shall be bound to take out a license, before the first day of May, in each year, from the revenue officer of the district wherein is situate his principal place of business or head agency, and to remain continually under license."

"The price of such license" was to consist of three per cent on every fire policy, and one per cent on every other policy, except marine policies. This price was to be collected by adhesive stamps in the manner regulated by the Act.

Held by the whole Court that this was not a direct tax within the meaning of the British North America Act.

Held also, that the Statute was *ultra vires* of the Local Legislature, and null. *Angers, Attorney-General & The Queen Insusance Company.* Judgment confirming. M. 14 Dec. 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Taschereau, JJ., Ramsay, J. was of opinion that the Statute was within the

powers of the Local Legislature—that a licence is a permit to do,—that the price of a licence or the form in which such price was imposed did not alter its character of licence,—that there was nothing in the enumeration of the Statute to limit the kind of licence that might be imposed by a Local Legislature,—that the real test of power was the object of the tax, i. e., to raise revenue for local purposes,—that the Local Legislatures for such purposes could tax subject within the scope of Dominion Legislation,—and that the inconvenience of such an impost as limiting the operations of trade is not a consideration for our Courts, but for the Dominion Government. Rep. 1 Legal News, 3, 22 J. 307.

The judgment was confirmed in the Privy Council where it was said: "Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license had been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a licence. They say on the face of the Statute. "The price of each "license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affisees them; or it may be that the assured buys the adhesive stamps, and affisees them, or pays an officer of the Company the money necessary to perchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this : that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and every thing said about the price of a license, and merely leave the rest of the Act in, the Government of the Province of Quebec obtains exactly the same amount by virtue of the Statute as it does with the licence clauses remaining in the statute. The penalty is on the issuing of the policy, receipt or renewal; it is not a penalty for not taking out the licence. The result therefore is this, that it is not in substance a licence Act at all. It is nothing more nor less than a simple Stamp Act on policies, with provisions referring to a licence, because, it must be presumed, the framers of the Statute though it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license."***

This is not a payment depending in that sense on the amount of trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out, and is not really a price paid for a licence, but, as has been said before, a mere stamp on the policy, renewal or receipt." Rep. 22 J. 312.

NOTE.—This argument seems to go too far, for if it be not a licence, but a stamp act, it is a direct tax on the company's business, or it is a direct tax on the insured.

A local act which disposes of the property of a Corporation created by a federal law is constitutional. *Dobie & The Board of Temporalities.* M. Judgment confirming, 19 June 1880, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, McCord, JJ., Ramsay, J., dissenting. Reported 3 Leg. News, 250.

NOTE.—This case went to the Privy Council, and was reversed.

The Act of Parliament 42 and 43, Vict., c. 48 is invalid, not being within the powers of parliament, " it is not in the nature of an insolvency law, for it is intended to apply to all building societies, whether solvent or not. It is therefore essentially an act affecting civil rights, which under the provisions of the British North America Act, 1867, comes within the exclusive jurisdiction of the Local or Provincial Legislature. *McClannaghan & St-Ann's Mutual Building Society.* M. Judgment confirming, but not on the principle laid down by the Court below, 4 February, 1880. Sir A. A. Dorion, C, J., Monk, Ramsay, Cross, JJ. Ramsay, J. concurred on the principle of the judgment except as to cost. *v.* COSTS. Rep. 3 Leg. News 61, 24 J., 162.

BUILDER.—His privilege for payment of work and materials, and for additional value given to an immoveable by his works. 1695, 2013 C. C.

His responsibility. 1688 C. C.

To secure the builders privilege accorded by article 2013 C. C. the builder must take the steps required by law, and it is not sufficient that he should do something of a similar kind. So an expertise made subsequent to the work is not that contemplated by the article of the Civil Code. And the privilege only dates from the registration of the Statement. *Robert et al., & Rieutord,* M. Judgment reversing, 26 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The liability of a builder of a portion of a structure for his bad-work does not extend to the superstructure built by another. *St-Louis & Shaw.* M. Judgment 24 Nov. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., 2 Dec. d'A. 374.

NOTE.—This case went to the Supreme Court, and was there confirmed 8 Sup. C. Rep. 385.

A builder may, by his contract, limit his liability in respect to the plan of the work to be erected by him.

The builder of a portion of a structure, who departs from the specifications of the portion of the work he is to execute, if he acts under the special instructions of the person in charge of the works, and whose orders he is charged to follow, is not liable for the solidity of the structure, if the evidence establishes that the building fell not from any defect in the workmanship, but owing to essential defects in the plan. *St. Patrick's Hall & Gilbert.* M. Judgment confirming, 29 January, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J., 1. 1 Leg. News, 116. 9 Rev. Leg., 613.

UILDING SOCIETY.—Building Societies are formed under chapter 69, C. S. L. C.

In 1875, the Legislature of the Province of Quebec passed "an Act to amend chapter 69 of the Consolidated Statutes for Lower Canada, respecting building societies, in providing for the means of their union or fusion. 39 Vic. C. 61, Q. In 1879, the Legislature of Quebec passed "an Act establishing further provisions relative to building societies in the Province of Quebec, and providing for the liquidation of their affairs." 42 & 43 Vic., c. 32. And also "an Act to ratify the proceedings on liquidation of certain building societies." 42 & 43 Vic., c. 33.

In 1877, the Parliament of Canada passed "an Act to make further provision respecting the constituting and management of building Societies in the Province of Quebec." 40 Vic., c. 50. In 1879, Parliament passed "an Act to provide for the liquidation of the affairs of building societies in the Province of Quebec." 42 Vic., c. 48. In 1882, Parliament passed "an Act respecting insolvent banks, insurance companies, building societies and trading corporations, 45 Vic., c. 23.

The Act of Parliament 42 & 43 Vic., c. 48 is invalid, not being within the powers of Parliament. "It is not in the nature of an insolvency law, for it is intended to apply to all building societies, whether solvent or not. It is, therefore, essentially an Act affecting civil rights, which, under the provisions of the British North America Act, 1867, comes within the exclusive jurisdiction of the local or provincial legislatures. *McClanaghan & St. Ann's Mutual Building Society.* M. Judgment confirming, but not on the principle laid down by the Court below, 4 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay concurred on the principle of the judgment except as to costs r. Costs. Rep. 3 Leg. News 61, 24 J. 162.

And so a building society or any other corporation, will be bound by a contract made in good faith by which they acquire property, although the contract be not one contemplated by their incorporation provided it be not in violation of any law of public order. *La Compagnie des villas du Cap Gibraltar & Hughes.* M. Judgment confirming. 24 March, 1883. Monk, Ramsay, Tessier, Cross, Baby, JJ. Cross, J., dissenting. 3 Dec., d'A. 175. Confirmed in Supreme Court.

And so a building society may bind itself for a loan by a promissory note, given without fraud for its profit, provided there be no special clause in its Act of incorporation prohibiting it from so contracting. *Canada Building Society & The National Bank.* M. Judgment confirming, 16 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Caron, JJ. Rep. 24 J. 226. 3 Leg. News, 130.

And a building society is liable on notes given to a bank for a loan to be lent to its subscribers. *The Canada Mutual Building Society & The Bank Ville-Marie.* M. Judgment confirming, 9 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec., d'A. 73

And so the society Appellants, constituted under chapter 69 of the Consolidated Statutes for Lower Canada, had the right sanctioned by its own by-laws, to acquire the real estate under the Deed of sale of the 7th October, 1874, in this case mentioned, and to consent to an "*Acte de Devis et Marché*" of same

date, by which the company agreed to build houses to be distributed among its shareholders.

Semble. This deed was calculated to carry out one of the objects of building societies. *La Cie. des Villas du Cap Gibraltar & Hughes.* M. Judgment confirming, 2 March, 1883. Monk, Ramsay, Tessier, Cross, Baby, JJ., Cross, J., diss. Rep. 3 Dec., d'A. 175.

A building society may in good faith acquire real estate for certain purposes. And therefore a deed by which they acquire lands for the purpose of leasing it to the vendors and to receive back the price is valid, and the *cessionnaire* of such lease, who has been accepted by the building society, will not be allowed to refuse payment of the instalments agreed to be paid under the deed of lease, on the pretext that the transaction was *ultra vires* of the society. *Lareau & La Société Permanente de Construction Jacques Cartier*, M. Judgment confirming 20 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 4 Leg. News 363.

A building society has a discretion to refuse to confirm the estimation of its valuator as to the sufficiency of the security on which a loan is to be granted. But this discretion must be exercised in a reasonable manner, and it is not reasonable to refuse to lend because the association does not wish to extend its risks in the part of the town where the property is situated, inasmuch as the rules distinctly state that all property in Montreal is available as security. Such an exercise of discretion would be limiting the rights of the subscribers. *The Canada Mutual Building Co., & O'Brien.* Judgment confirming 3 Feb'y, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep. 3 Leg. News, p. 58.

A building society being in financial difficulties agreed with its creditor not to diminish its real estate without his consent. This agreement was ratified at a meeting at which Appellant was present. Appellant subsequently sued the Society for his *versements*, and obtained judgment. In execution of his judgment he seized the real estate of the Society. The creditor put in an opposition *afin d'annuller* based on the agreement. *Held*, that this opposition should be maintained. *Champoux & Lapierre*, M. Judgment confirming 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. The Chief Justice and Ramsay, J., dis., 3 Leg. News 302.

To facilitate the liquidation of a mutual building society, a resolution was passed at a meeting of the borrowing members, to discharge those who within three months should pay 80 per cent of their indebtedness, the surplus, after paying the non-borrowing members in full, to be divided among the borrowing members. *Held*, that those non-borrowing members who did not discharge the society, were not bound by this arrangement, and were entitled to claim the surplus to the exclusion of the borrowing members who had all discharged the society. *Harvey & O'Shaughnesey*, M. Judgment confirming, 19 Nov., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. The Chief Justice and Monk J., dis. Rep. 6 Leg. News 369.

Respondent borrowed from a building society $600 and gave a deed to the following effect: " Il est expressément " stipulé entre les dites parties, La So- " ciété Permanente de Construction du " Comté de Berthier et le Défendeur en " cette cause, que dans le cas où le dit " débiteur se trouverait en aucun temps " avoir manqué de faire six paiements " consécutifs de capital, amendes, inté- " rêts et bonus sur les dites douze parts " dont le montant lui est avancé comme " susdit, alors toute la dite somme de " six cents piastres deviendra immé- " diatement *due et exigible*, sans qu'il " soit besoin d'*aucune notification ni* " *mise en demeure* dans ce cas, il sera " loisible aux directeurs de la dite socié- " té, qui en auront absolument le droit, " tel que le dit débiteur le leur donne " et les y autorise spécialement par les " présentes, dans le but d'épargner les " frais de *poursuite et d'une vente forcée*,

" de céder, vendre et transporter à qui " et comme bon leur semblera, aux prix " et conditions qu'ils trouveront les plus " convenables et les plus avantageuses, " les immeubles plus haut décrits, et " d'en passer bon et valable titre pour " et au nom du dit débiteur et de mettre " en possession et jouissance de tels im- " meubles l'acquéreur ou les acquéreurs " d'iceux, aussitôt après la passation de " tel acte de cession ou vente qui aura " la même force, valeur et effet que si le " dit débiteur lui-même l'eût signé et " consenti."

Notwithstanding the terms of this deed the Building Society could not sell without the authorisation *en justice*, and a deed of sale by the Building Society to the Appellant, will be declared null and of no effect as regards the borrower, and the petitory action of the pretended purchaser will be dismissed. *Gélinas & Marchand.* Q. Judgment confirming, 4 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 9 Q. L. R., 120.

The money advanced to the owner of a property by a building society becomes the money of the borrower, and the building society cannot therefore claim any privilege for improvements made with such money, by the owner of the property, so as to defeat or retard the claim of the *bailleur de fonds* for which the owner is personally responsible. *Grant, al. & La Société Permanente de Construction.* M. Judgment reversing, 25 Jan., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. *v.* ACCOUNT.

C

CADASTRE.—A *cadastre* or schedule under "The Seigniorial Act of 1854" and the acts amending the same, is a statement in tabular form, in triplicate of the rights to be dealt with in abolishing the seigniorial tenure, and their values. These *cadastres* afterwards served, in some sort, as a basis for the official plans and books of reference prepared for registration purposes, C. S., L. C., cap. 37, ss. 68, 69.

A *bail emphytéotique* made by a seignior of the right to build a saw mill on an island within the limits of the seigniory in consideration of a rent of £15 a year, is not a *rente seigneuriale* within the meaning of the acts for the abolition of the Seigniorial tenure, or such a rent as should be entered in the *cadastre* of such Seigniory. *Hart & Trudel*, Q. Judgment reversing 5 December, 1874. Monk, Taschereau, Ramsay, Sanborn, Bossé, JJ.

The failure to make the opposition required by sections 40 and 41 of the Seigniorial Act of 1854, within the delay of six months, is fatal, and third parties acquiring from the *grevé* as proprietor in possession can take advantage of it.

The claim of the *appelés* becomes personal against the *grevé*. *Panet & Boisseau & al.*, Q. Judgment reversing 8 September, 1879. Sir A. A. Dorion, C. J., Monk Ramsay, Cross, Routhier, JJ. Rep. 5 Q. L. R. 377, 10 Rev. Leg. 163.

The omission to enter in the *cadastre* a constituted rent to represent the former seigniorial rent cannot be rectified. *La Corporation Episcopale Catholique Romaine du diocèse de St-Hyacinthe & The Eastern Townships Bank*, M. Judgment confirming 21 September, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby JJ.

CAHIER DE CHARGES.—*v.* SALE.

CAPIAS.—*v.* INSOLVENCY.

§ 1. WHO MAY PROCEED BY *capias*.
§ 2. WHO MAY BE ARRESTED ON *capias*.
§ 3. AFFIDAVIT.
§ 4. JUDGE'S ORDER 801 C. C. P.
§ 5. WRIT.
§ 6. PETITION TO QUASH.
§ 7. BAIL.
§ 8. SURRENDER.
§ 9. STATEMENT AND ABANDONMENT.
§ 10. MISCELLANEOUS.
§ 11. INSOLVENT ACT 1875.

§ 1. *Who may proceed by capias. v.* articles 798, 799, 800, 801 C. C. P.

A creditor whose debt is secured by hypothec may arrest his debtor under *capias* for the same causes as if he had no hypothec. *Benoit & Petitclerc*, Q. Judgment confirming 7 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 9 Rev. Leg. 385, 1 Leg. News 32. (1)

A debtor living in Ontario but coming to Montreal may be arrested under *capias* for secreting his effects in the Province of Ontario. *Robertson & Gault & al.*, M. Judgment confirming 22 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

§ 2.—*Who may be arrested under capias.*—Persons against whom the proper affidavit can be sworn, may be arrested on *capias*. C. C. P. 798, 799, 800.

"Saving the exceptions contained in articles 2272 and 2273 in the Civil Code, a writ of *capias* cannot issue:

1. Against priest or ministers of any religious denomination whatever;

2. Against septuagenarians;

3. Against females." C. C. P. 805.

A debtor thrown into insolvency

may be proceded against by way of *capias* by one of his creditors. *Desjardins & Thibaudeau, et al.* M. Judgment confirming, June 1875, Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

The same was ruled in the case of *Beaudin & Roy*, M. Judgment confirming, 20 Septembre 1875. Dorion, C. J., Monk, Ramsay, Taschereau, Sanborn, JJ. Rep. 20 J. 308.

A *capias* against an insolvent may be maintained for secreting his property, and this charge will be sustained by evidence to show that large sums sufficient to account for the insolvency have been made away with *vace* not accounted for. *Downey & Winning, et al.* M. Judgment confirming, March 1875, Dorion, C., J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The writ of *capias* " is obtained upon an affidavit of the Plaintiff, his bookkeeper, clerk, or legal Attorney, declaring that the Defendant is personally indebted to the Plaintiff in a sum amounting to or exceeding forty dollars and that the Deponent has reason to believe, and verily believes, for reasons, specially stated in the affidavit, that the Defendant is about to leave immediately the Province of Canada, with intent to defraud his creditors in general, or the Plaintiff in particular, and that such departure will deprive the Plaintiff of his recourse against the Defendant ; or upon an affidavit establishing, besides the existence of the debt as above mentioned, that the Defendant has secreted or made away with, or is about immediately to secrete or make away with his property and effects with such intent. C. C. P. 798.

" The affidavit required in the above articles, may be made by one person only, or by several persons swearing each to a portion of the necessary facts, and it may be received and sworn to before a judge of the Superior Court, or by the Prothonotary who certifies the writ of *capias*." C. C. P. 807.

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(1) NOTE.—Ramsay, J., was absent at the rendering of the Judgment.

The president of an incorporated company is competent to make the affidavit for a *capias* under Art. 798, C. C. P. And the affidavit may be sworn before the Deputy Prothonotary. *The Moisic Iron Co. & Olsen.* Q. Judgment reversing, 6 Dec. 1873, Duval, C. J., Badgley. Monk, Taschereau, Ramsay, J.J., Monk, Ramsay, JJ. dis., but not as to these points. Rep. 18 J. 29.

Where the affidavit for an attachment is in the form given by the Statute it will be held sufficient although it does not follow precisely the terms of the code.

And the affidavit being made before the Prothonotary, and not before a Commissioner, does not make the form inapplicable as the affidavit before the Commissioner was given to obtain the remedy under article 834 C. C. P. *Dallimore ès-qu. & Brooke*, M. Judgment confirming, 15 Sep. 1874, Dorion, C. J. Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Rev. Leg. 557.

Where deponent swears he " merely believes " for reasons specially stated, it is not necessary to say he " has reason to believe." *Philips & Sutherland*, M. Judgment confirming, March 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An affidavit for capias, under C. C. P. 798, in which, as to the alleged secreting, the deponent swears: " Le déposant est informé d'une manière croyable, a toute raison de croire et croit vraiment en sa conscience que le dit O. B. a caché et soustrait et est sur le point de cacher et soustraire avec l'intention," etc., is sufficient. *Blake & Wadleigh.* Q. Judgment reforming, 7 Dec., 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 6 Leg. News, 3.

A defendant sued in damages for having illegally, fraudulently and feloniously conspired with the cashier of a bank to rob it of its funds was arrested upon capias, on the affidavit of a director. This affidavit only speaks of the deponent's belief, except in one allegation. Ramsay, J., doubted as to whether

swearing to belief was sufficient, but he thought that there was one allegation where the deponent swore positively by giving the reasons for his belief, and that this was sufficient. *Goldring & The Hochelaga Bank.* M. Judgment confirming, 24 June, 1878. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News, 230.

An affidavit is sufficient which alleges that the debtor is about to leave "the Dominion of Canada," when it can be gathered from the other allegations of the affidavit that the departure is really from a point within the limits of the former Province of Canada. *Moisic Iron Company & Olsen.* Q. Judgment reversing 6 December, 1873. Duval, C. J., Badgley, Monk, Taschereau, Ramsay, JJ. Monk, Ramsay, JJ. dis. Reported, 18 J. 29.

It is a sufficient allegation to say that the Defendant was about to "leave that part of the Dominion of Canada heretofore constituting the Province of Canada. *Phillips & Sutherland.* M. Judgment confirming, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An affidavit which after setting up the ground of indebtedness, proceeds to state " that this deponent has every reason to believe and verily believes that the said Arnold Hagens the above name defendant is about to leave immediately the Province of Quebec and the Dominion of Canada, with intent to defraud his creditors in general, and that such departure will deprive the deponent of his remedy against the said Arnold Hagens, and also that the said Arnold Hagens has made away with and is about immediately to make away with his property and effects with intent to defraud his creditors in general. That special reasons for such this deponent's belief are, that this deponent was informed this day by Cornelius C. Snowdon of Montreal, merchant, that the defendant, Arnold Hagens, was making away with his stock, and sending the money to Germany, with intent to defraud his creditors, and that he, the said Arnold Hagens, was about to leave the country, and that this deponent has recently received similar information from other persons, &c.. " is sufficient and such affidavit will be sufficiently substantiated by evidence that he was making away with the goods of the firm of which he was a partner. Art. 797 C. C. P., says so in terms, *Hagens & Ramsay.* M. Judgment confirming, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

NOTE.—It will be observed that the affidavit was filed in support of two grounds of *capias*, secreting and departure. " It was sustained; but the Court did not hold that it was sufficient to allege that the defendant was about to leave the Dominion of Canada, as in the Moisic case, or the Province of Quebec. The " Province" referred to in C. S. L. C., c. 87, § 8, was the then Province of Canada.

An affidavit which after relating the indebtedness sets forth " that Mr. P., the deponent's partner was informed last night in *Toronto*, by one H. a broker, that the said W. P. S. was leaving immediately the Dominion of *Canada*, to cross over the sea for *Europe* or parts unknown, and deponent was himself informed. this day, by J. R., broker, of the said W. P. S's departure for *Europe* and other places" is defective. *Shaw & McKenzie.* M. Judgment confirming, 12 Nov., 1880. Rep. 3 Leg. News, 369.

It is not necessary in the body of an affidavit to state where the debt arose specially.

A debt arising from the acceptance of a succession is a personal debt.

If the *capias* be taken because the debtor is about to leave Canada, the affidavit must allege in what the fraud consists. *Hurtubise & Bourret.* M. Judgment confirming, 4 February, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 9 Rev. Leg., 638, 2 Leg. News, 54, 23 J. 130.

Damages claimed for the breach of a contract made in Norway, but to be

executed in the Province of Quebec, do not constitute "a debt created out of the Province of Canada." (Art. 806 C. P.) *The Moisic Iron Co. & Olsen.* Q. Judgment reversing, 6 Dec., 1873. Duval, C. J., Badgley, Monk, Taschereau, Ramsay, JJ. Monk, Ramsay, JJ., dis. Rep. 18 J. 29.

Une déposition pour l'émanation d'un bref de *capias ad respondendum*, faite après l'institution d'une poursuite pour le recouvrement d'une créance, et contenant seulement l'allégué, que depuis l'institution de l'action le défendeur a caché et soustrait ses biens, dettes et effets, avec l'intention de frauder ses créanciers en général, et les demandeurs en particulier, est suffisante et légale, et qu'il n'est pas nécessaire de donner, dans cette déposition, les raisons de la croyance du déposant.

Le défendeur sur le bref de *capias* qui demande sa cassation, sur requête, ne sera pas admis au mérite sur la requête, à transquestionner le déposant, mais qu'il doit en faire son propre témoin. *Danjou & Thibaudeau & al.*, Q. Judgment confirming 4 May, 1882. Rep. 11 R. Leg. 512.

An affidavit for *capias*, which sets out merely the intended departure of Defendant without paying his debt to Plaintiff, is insufficient. *Caffrey & Lighthall*, M. Judgment reversing 30 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 282, 2 Dec. d'A. 10.

§ 4. *Judge's order* 801 *C. C. P.*

"If the demand be founded upon a claim for unliquidated damages the writ of *capias* cannot issue without a judge's order after examining into the sufficiency of the affidavit; and the affidavit in such case must state the nature and moreover the amount of the damages sought, and the facts which gave rise to them, and the judge may in his discretion, grant or refuse the *capias*, and may fix the amount of the bail upon giving which the defendant may be released."

The following form of the judge's order required by art. 801 C. P., is sufficient: "Seeing the foregoing affidavit, the amount of bail to be given under article 801 of the Code of Civil Procedure is hereby fixed at——." *The Moisic Iron Co. & Olsen*, Q. Judgment reversing 6 Dec., 1873. Duval, C. J., Badgley, Monk, Taschereau, Ramsay, JJ. Rep. 18 J. 29.

§ 5. *Writ.*

The writ of *capias* may be executed on a Sunday, under art. 786 C. C. P. *The Moisic Iron Co. & Olsen*, Q. Judgment reversing, 6 Dec. 1873. Duval, C. J., Badgley, Monk, Taschereau, Ramsay, JJ. Monk, Ramsay, JJ., dis. Rep. 18 J. 29.

A Writ of *capias* under which one of several Defendants is arrested, although it be headed as if there were only one Defendant, the affidavit being properly headed and referring to the Defendants is sufficient. *Phillips vs. Sutherland*, M. Judgment confirming March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a Writ of *capias* could not be executed, and the delay for the return was consequently insufficient. *Held* that the Plaintiff may take an *alias* Writ to detain his debtor. *Richard & Wurtele*, Q. Judgment confirming 7 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 32.

§ 6. *Petition to quash.*

"Upon a petition presented to the Court, or to a judge in term or in vacation, the Defendant may obtain his discharge by establishing that he is not liable to be imprisoned, or by showing that the essential allegations of the affidavit upon which the *capias* is founded are false or insufficient." C. C. P. 819.

Where a petition to quash setting up matters of law is rejected, the Defendant will not be allowed to present another petition as to the facts.

Phillips and Sutherland, M. Judgment. (1)

A Defendant arrested on *capias* must raise all his objections to the sufficiency of the affidavit in the Court of first instance, as none others will be considered in appeal. *Heyneman & Smith*, M. Judgment confirming 18 September 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 21 J. 298.

And, it appears, that where an objection to a petition to set aside a *capias* is not taken in the Court below, it will not be considered in appeal, and the petition was heard although another petition had been heard and rejected in the Court below, prior to the one now in appeal. *Brown & The Canadian Bank of Commerce*, M. Judgment January, 1876.

The Appellant gave the Bank corn for advances, by transferring the Bill of Lading under a special receipt by which the Bank was to be paid out of the proceeds. The Appellant's firm sold the corn and appropriated the money to pay another creditor.

The petitioner contended that the corn was not that of himself or of his firm—that if it was they had dealt with it as the Bank directed, and that he had personally no part in the fraud, if any, and that at most the payment was merely a preference not secreting.

The *capias* was maintained. The corn was sold as the property of Petitioner's firm, and the proceeds were funds in their hands destined to the payment of the Bank. The payment to another was a fraudulent secreting of this money, and they are liable for it as for any other funds in their hands. Their excuse is virtually, this is not secreting it is an offense under the larceny act. It is therefore more than a mere preference. *Brown & the Canadian Bank of Commerce.* M. Judgment confirming, 27 January, 1876. Dorion, C. J., Ramsay, Sanborn, Tessier, JJ.

(1) NOTE. — Mentioned in factum in *Brown & The Bank of Commerce.*

A payment made in the ordinary course of business, although it may be in some sense a preferential payment, does not justify a *capias*, but a preferential payment may be of such a character as to amount to a secreting, and so justify a *capias*. *Ferland & Nield*, Q. Judgment confirming, 3 September, 1877. Dorion, C. J., Monk, Ramsay, McCord, JJ.

A fraudulent preference, by which assets which should be available to the creditors generally, are given to one or more is equivalent to secreting. *Gault et al. & Dussault.* M. Judgment reversing, 1 Oct., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, Cross, JJ. dis. Rep. 4 Leg. News 321.

An insolvent debtor, who without fraud, sells his property to a minor with long credit, without consulting his creditors is not liable to be arrested on *capias. Beaudette & Audette*, Q. Judgment confirming, 7 June 1878, Dorion, Monk, Ramsay, Tessier, Cross, JJ Monk, J., dis. Rep. 8 Rev. Leg. 581

A *capias* will be set aside on evidence that the party arrested was young, that he acted under the influence of his father, although he being book-keeper of the concern, of which he was a partner, made fraudulent entries in the books, to the damage ot the creditors. *Leclaire & Dastous.* M. Judgment confirming, rendered at Q. 8 Oct. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, dis.

§ 7 *Bail.*

The defendant may obtain his discharge upon giving two good and sufficient sureties that he will not leave the province of Canada and that in case he does so, such sureties will pay the amount of the judgment that may be rendered in principal, interest and costs ; or the amount fixed by the judge in the case of art. 801. But this bail cannot be received after the expiration of the eighth day from the day fixed

for the return of the writ of *capias* unless with leave of the court expressly granted upon sufficient cause shewn. C. C. P. 824.

A defendant arrested under *capias* may obtain his provisional discharge by giving good and sufficient sureties to the Sheriff to the satisfaction of the latter before the return day of the writ, that he will pay the amount of the judgment that may be rendered upon the demand in principal, interest and costs, if he fails to give bail pursuant to Art. 824 or to Art. 825. 828 C. C. P.

§ 8. *Surrender.* The Defendant arrested on *capias* may also obtain his discharge at any time before judgment, by giving good and sufficient sureties to the satisfaction of the Court, or judge, or prothonotary, that he will surrender himself into the hands of the Sheriff, when required to do so by an order of the Court or Judge, within one month from the service of such order upon him or upon the sureties, and that in default they will pay the amount of the judgment in principal, interest and costs, or the amount fixed by the judge in the case of article 801, C. C. P. 825 C. C. P. 831, 833.

The sureties of a debtor arrested on *capias*, who were under bond to the sheriff are freed from their liability, if on the day of the return of the Writ they deliver the debtor to be held under the Writ. (Art. 828 C. C. P.) *Angers & Trudel & al.*, Q. Judgment confirming 5 June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 566.

§ 9. *Statement and abandonment.*

A Defendant arrested under a *capias ad respondendum*, who has given special bail under C. C. P. 824, not to leave the heretofore Province of Canada, is not liable to *contrainte par corps* if he neglects to file the statement and make the declaration of abandonment mentioned in art. 764 C. C. P., within 30 days from date of judgment maintaining the *capias*. *Cossitt & Lemieux*, M. Judgment confirming 22 November, 1880. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Baby, JJ., dissenting. Reported 5 Leg. News 254, 2 Dec. d'A. 14.

Inasmuch as the Code of C. P. failed to attach any penalty whatever for not filing the statement required by art. 766, the penalty provided by art. 2274 of the C. C. and by ch. 87 of the Cons. Stat. of L. C., sec. 12, sub-sec. 2, cannot be enforced; the effect of art. 1360 (1) of the Code of C. P., being to repeal the provision of the Statute and of the Civil Code. *Molson & Carter*, M. Judgment reversing 6 March 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Ramsay, Baby, JJ., dissenting. Rep. 26 J. 159, 8 Q. L. R. 338.

§ 10. *Miscellaneous.*

Where a *capias* has been declared good, and the Defendant in appealing from the judgment maintaining it gives security for costs only, and files a declaration that he does not object to the execution of the judgment, the appeal does not suspend proceedings against the sureties to the sheriff. *Lajoie & Mullin & al.*, M. Judgment reversing 21 December, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 59.

A creditor who arrests his debtor on

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(1) The laws concerning procedure in force at the time of the coming into force of this Code are abrogated:

1o. In all cases in which this Code contains any provisions having expressly or impliedly that effect; in all cases in which such laws are contrary to or inconsistent with any provision of this Code or in which express provision is made by this Code upon the particular matter to which such laws relate.—Except always that as regards proceedings, matters and things anterior to the coming into force of this Code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which, without this Code, would apply to such proceedings matters and things remain in force and apply to them, and this Code applies to them only so far as it coincides with such provisions.

capias, and has probable cause for so doing, is not liable in damages although the debtor can justify his proceedings. *Lapierre & Gagnon*, Q. Judgment reversing 7 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep. 8 Rev. Leg. 727, 1 Leg. News 32.

Want of reasonable and probable cause.—Damages. S., a debtor resident in Ontario, being on the eve of departure for a trip to Europe, passed through the city of Montreal, and while there refused to make a settlement of an overdue debt with his creditors, McR. *et al.*, who had instituted legal proceedings in Ontario to recover their debt, which proceedings were still pending. McR. *et al.*, thereupon caused him to be arrested, and S. paid the debt. Subsequently S. claimed damages from McR. *et al.*, for the malicious issue and execution of the Writ of *capias*.

McR. *et al.*, the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent McR., one of the defendants, for his belief that the appellant was about to leave the Province of Canada were as follows:—"That Mr. P., the deponent's partner, was informed last night in Toronto by one H., a broker, that the said W. J. S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and deponent was himself informed, this day, by J. R., broker, of the said W. J. S's departure for Europe and other places" The appellant S. was carrying on business as wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker and all his business friends knew he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by McR., that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that S. would not pay him, that he might get his money the best way he would."

Held: That the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors; and that the evidence showed the respondent had no reasonable and probable cause for issuing the writ of *capias* in question.

Damages for illegal arrest under *capias*. Probable cause is a sufficient justification for arrest under *capias*. *Shaw & Mackenzie.* Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Dorion, C. J., Cross, J., dis. Judgment confirming 12 Nov., 1880. Rep. 3 Leg. News 369, 2 Déc. de la Cour d'Appel 25. On appeal to the Supreme Court the judgment was reversed, that Court being of opinion that the departure of the Plaintiff without paying a commercial debt after having avoided Defendants' collector, vainly resisted payment by an untenable action, and then setting his creditor at defiance by telling him he would not pay, and that he might get his money the best way he could was not "probable cause" to justify the allegation of the Defendant that he was leaving the Province with intent to defraud.

Where a person who has been arrested under a *capias* and given bail has been subsequently adjudged to file a statement and make a judicial abandonment of his property, and has made default, that he cannot be condemned to imprisonment in consequence of such default. *Goldring & La Banque d'Hochelaga*, M. Judgment reversing 21 March, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 29 J. 192.

§ 11. *Insolvent Act* 1875.

Capias under section 9. *Cimon & Amos*, Q. Judgment confirming 8 June,

1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

" Any debtor confined in gaol or on the limits in any civil suit, who may have made the assignment provided for in this act, or against whom process for liquidation under this act may have been issued, may, at any time after the meeting of creditors provided for in this act, make application to the judge of the county or district in which his domicile may be or in which the gaol may be in which he is confined, for his discharge from imprisonment or confinement in such suit; and thereupon such judge may grant an order in writing, directing the sheriff or gaoler to bring the debtor before him for examination at such time and place in such county or district as may be thought fit; and the said sheriff or gaoler shall duly obey such order, &c." In act 1875, s. 127. (1) *Gault & Robertson*, M. Judgment confirming 22 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Ramsay, JJ., dis.

CARRIER.—RAILWAY CASES.—An acceptance by a carrier, to whom it was agreed the goods were to be delivered, is not such an acceptance by the carrier as under our system prevents the purchaser refusing to receive the goods and pay for them if they are of inferior quality. *Huston & Baille.* Q. Judgment reversing, 4 March, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, Plamondon, JJ.

A carrier, bailee of a quantity of corn, put on board his ship, can plead the same defence to a *saisie revendication* as would be good in the mouth of the consignor. It is to urge his own interest and not to *exciper le droit d'autrui. Borrowman & al. & Bass.* M. Judgment confirming, December, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

NOTE.—The Chief Justice heard the case but took no part in the decision, he being administrator of the Government of Quebec, at the time.

(1) NOTE.—Repealed.

A carrier is responsible for the loss of a passenger's baggage by fire, unless he proves that the fire arose through no fault of his. It is not sufficient to show generally care, but the fact must be explained. Fire is not necessarily presumed to be *force majeure. The Canadian Navigation Company & McConkey.* M. Judgment confirming, 14 Dec., 1877. Sir A. A. Dorion, C. J. Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News, 23.

A notice on a passenger's ticket that the carrier will not be responsible for the safe-keeping of the passenger's baggage, is not binding on the passenger, without proof of notice to him of limitation of liability. *Allan & al. & Woodward.* M. Judgment confirming. 18 September, 1878. Dorion, C J., Monk. Ramsay, Tessier, Cross, JJ. 22 J. 315. 1 Leg. News, 458.

Railway companies subject to the provisions of the act respecting railways, (C. S. C. C. 66) are bound to carry all goods that are offered at any of their stations to any other station on their line, unless some valid reason be assigned for not doing so. The Canadian Railway Act is compulsory and not permissive only. Under it railway companies are made common carriers, and they cannot limit their obligations by a notice stating that they will not carry any class of goods, witnout assigning a sufficient reason for such refusal. *Rutherford & The G. T. Railway.* M. Judgment reversing, 17 March, 1875. Rep. 20 J. 11.

A way-bill by common carrier for goods may be transferred by endorsement, like a bill of lading. Being so transferred, and the carrier being notified of the transfer, the goods can only be delivered to the holder.

The agent of a Railway Company in charge of one of its stations, will be presumed to be authorized to give such way-bill (styled " shipping bill" in the form used), and the company will be bound by his acts in this respect. *The*

Grand Trunk Railway Co. & Shaw. Judgment confirming that of Superior Court, December, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

CAUTION.— *V.* SURETY.

CAUTIONNEMENT.— *V.* SURETYSHIP.

CERTIORARI.—*Certiorari* is a writ commanding an inferior court to send up a record of the proceedings in a case. It may be ordered to issue to bring up proceedings before a magistrate when a *habeas corpus* is granted, on the complaint of an unjust detention, and, " in all cases where no appeal is given from the inferior courts above mentioned, the case may be evoked before judgment, or the judgment may be revised, by means of writ of *certiorari*, unless this remedy is also taken away by law." 1220 C. C. P.

The remedy lies nevertheless, only in the following cases:

1o. When there is want or excess of jurisdiction.

2o. When the regulations upon which a complaint is brought, or the judgment rendered are null or of no effect.

3o. When the proceedings contain gross irregularities and there is reason to believe that justice has not been or will not be done." 1221 C. C. P.

"The Circuit Court has also concurrent jurisdiction with the Superior Court, by means of *certiorari* over judgments rendered within the limits of the district or circuit for which it is held, by the Commissionners' Court mentioned in the preceding article, or by Justices of the Peace, wherever a *certiorari* lies." 1056 C. C. P.

It is also the proper proceeding when the record has been sent up in appeal but is imperfect.

Where affidavits are produced to establish that a material paper has not been sent up with the record in appeal a *certiorari* will be granted. *De Gaspé & Asselin.* Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ., M, Judgment September, 1875.

But where the materiality of papers not produced is denied, and it does not appear by the affidavits that they are material, the writ will be refused. *Quesnel & The Corporation of Princeville.* Q. Judgment, March, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Motion for *certiorari* to bring up papers not returned with the record. Consent was offered for the production of the papers; but the Court refused to allow them to be filed without a regular return. Q. *Bouffard & Nadeau,* Judgment, 4 December 1875, Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

Papers wanting in the record were allowed to be filed with a certificate, without the issue of a *certiorari. Dunning & Wurtele.* Q. Judgment, 1 Dec. 1877.

The Court of Queen's Bench will not, on *habeas corpus,* order a *certiorari* to issue, to bring up the record of preliminary proceedings before the committing justice to see whether the evidence is sufficient to commit. *Ex-parte Narbonne.* 22 December 1879, Dorion, C. J., Monk, Ramsay, Tessier, JJ., Monk, J. dis. Rep. 3 Leg. News 14.

CHARTER PARTY. *v.* AFFREIGHTMENT. —SHIPPING.

CHECK.—A cheque resembles an inland bill of exchange, and it is not payment until cashed. *Ladouceur & Morasse.* M. Judgment, 20 Sept. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ.

Le 4 février 1880, l'Appelant a donné à l'Intimé pour balance d'un prix de vente, son chèque sur la Banque du Peuple pour la somme de $3,333.34 après avoir écrit sur la marge du chèque les mots " payable sous huit jours." L'action est portée sur ce chèque, et l'Appelant plaide que l'immeuble pour lequel le chèque a été donné est chargé,

envers le Séminaire de Montréal, d'une somme de $414.16 pour commutation et d'une somme de $979.90 pour taxes municipales dues à la Cité de Montréal. L'Appelant a de plus opposé en compensation diverses créances qu'il avait contre l'Intimé lorsque le chèque a été donné et d'autres qu'il a acquises depuis.

Jugé:—1o. Que sous les circonstances le chèque doit être considéré comme devant être payé à tout évènement, et sans égard aux créances que l'Appelant peut avoir contre l'Intimé, et qu'il ne peut opposer ces créances pour compenser la demande de l'Intimé.

2o. Que la commutation des droits seigneuriaux due au Séminaire de Montréal en vertu du ch. 41, sect. 67, des Statuts Refondus du Bas-Canada sur la mutation qui a lieu par la vente que l'Intimé a faite à l'Appelant est due par l'Appelant qui a acheté et non par le vendeur.

3o. Que l'Appelant, qui aurait eu le droit de retenir sur le prix de vente les taxes dues sur la propriété qu'il a achetée de l'Intimé, a droit de demander que la somme qu'il a payée pour les taxes dues par l'Intimé soit déduite du montant du chèque qu'il a donné. *Dorion & Dorion & e contra.* M. Judgment reforming, 17 Nov., 1883. Sir A. A. Dorion, C. J., Monk Ramsay, Tessier, Cross, JJ. Rep. 3 Dec., d'A. 389.

CHOSE JUGEE.—*V.* RES JUDICATA.

Le bureau ordinaire d'une fabrique peut autoriser des poursuites pour le recouvrement des revenus ordinaires de la fabrique et pour l'obtention d'un titre nouvel.

Cette autorisation n'a pas besoin d'être spéciale ; mais qu'une autorisation générale de prendre des procédés légaux contre ceux qui sont endettés envers la fabrique, sans spécifier le nom de chaque débiteur, est suffisante.

Le défaut d'autorisation pour appeler dans une action de ce genre ne peut pas être invoqué pour la première fois à l'audition de la cause en appel, quand il n'a pas été invoqué dans le cours de la procédure et que les procureurs de l'Appelant n'ont pas été mis en demeure de produire leur autorisation. (*Semble*, 1o. Que l'appel en telles matières devrait être autorisé d'une manière tout aussi formelle que l'action en première instance ; 2o. Que le bureau ordinaire de la fabrique pourrait donner l'autorisation requise pour cet appel.) *Les Curés et Marguilliers de l'œuvre et Fabrique de la paroisse de Ste. Anne de Varennes & Choquet.* M. Judgment reversing, 21 March, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Sir A. A. Dorion, C. J., dissenting. Rep. M. L. R. I. Q. B. 333.

CIRCUIT COURT.—The general ultimate jurisdiction of the Circuit Court, 1053 C. C. P. Its jurisdiction subject to appeal, 1054 C. C. P. Its jurisdiction upon evocation, 1055 C. C. P. By means of certiorari, 1056 C. C. P. As an appellate Court. Its jurisdiction may be ousted by evocation, 1058 C. C. P.

The Circuit Court has original jurisdiction in all actions, even in real actions, where the value of the object in litigation does not exceed $200.00.

That if it does not appear that the value is over $200 the Court will be presumed to have jurisdiction. *Dumas & Gagnon*, Q. Judgment reversing, 4 March 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The Circuit Court has jurisdiction in a suit for $102.35 although there be conclusions in the declaration to set aside a deed of donation of property of a greater value than $400, the interest of the Plaintiff not exceeding the amount of his action. *Leduc & Tourigny*, 7 Dec. 1883, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

CIVIL DEATH.—Civil rights are lost. 1. *** 2. By civil death. Civil death results from condemnation to certain corporal punishments : condemnation to death, and the condemnation to any other punishment for life. 31, 32, 33 C. C. Article 34 C. C., in language pur-

posely inconclusive declares: "The disabilities which result as regards persons professing the catholic religion, from religious profession by solemn and perpetual vows made by them in a religious community recognized at the time of the cession of Canada to England and subsequently approved, remain subject to the laws by which they were governed at that period." 34 C. C.

Mr. Justice Loranger in the introduction to his commentary on the Civil Code, Vol. 1, p. 26, says the language of article 34 is "*quelque peu sibyllin.*" The article as originally drafted was in these words:

"The religious profession which carries with it civil death is that which is voluntarily made for life by a person of the required age with solemn vows and the requisite formalities in a religious order recognized and approved."

The difficulty that arose was this, *la mort civile* of *cloitrées*, was due to their voluntary seclusion from the world, and by which they renounced to the civil right of leaving their cloister. Could this exist under the public law of England? Article 34 therefore recognized the possible existence of cloistered institutions with *perpetual* vows, and declared that their disabilities should "remain subject to the laws by which they were governed" at the time of the cession of Canada to England. Mr. Justice Loranger, at page 327 of the work already quoted, combats Mr. Justice Day's objections to article 34. The learned commentator's criticism of the first objection of the dissentient report is perfectly victorious. "Connection of church and state has become a sort of watchword, and one not of the most intelligent kind; and, as a watchword, it has the advantage of taking the place of reason. The connection of the Church and State is a question of degree. There is more or less connection of a church with the State when it is recognized by the State, or even tolerated. The real question is, as has been observed, whether the personal *status* of a British subject can be limited by a civil contract so as to deprive such subject of personal liberty. Mr. Justice Loranger's answer does not really deal with this part of the question.

CIVIL STATUS.—This expression has almost entirely lost significance as a legal term under our law. Those civilly dead alone have lost civil status with us. The term has only survived in the second title of the Code: "Of Acts of Civil Status," as signifying the entries in registers of births, marriages, burials and of religious profession.

The appointment of a judicial adviser does not change the Status of the party, and therefore (1) it is not necessary to have a *reprise d'instance. Rolland & Michaud,* M. Judgment 2 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

CLERK. *v.* MANDATE.

COLLISION. *v.* SHIPPING.

COLLOCATION.—Articles 741 and 751 C. C. P. authorizing any person interested in the distribution of money, to come in and make proof of the discharge of any hypothec mentioned in the registrar's certificate or in any opposition, do not apply to the creditor who is alleged to have been collocated, for a sum not due, has actually received the money, after judgment homologating the report of distribution. *Leduc & McCarthy,* Q. Judgment reversing 7 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 107, 1 Q. L. R. 1.

An action will not lie by a hypothecary creditor, who has not been collocated in a report of distribution for a claim against an immovable mentioned in the registrar's certificate, to recover from a party alleged to have been illegally collocated by preference, the sum which plaintiff claims belonged of right to him. The recourse of a party aggrieved by a judgment of distribution is by appeal, or by petition in revoc-

(1) The reason is not a very good one.

ation, or by opposition to the judgment, as pointed out in C. C. P. 761. *McDonnell & al. vs. Buntin*, M. Judgment confirming 21 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 7 Leg. News 130, M. L. R. 1 Q. B. 1.

COLPORTEUR. *v.* CORPORATION.

COMMERCIAL MATTER.—In a commercial matter where two or more persons are subject to the obligation, they are presumed to be jointly and severally liable, except in cases otherwise regulated by special laws. 1105 C. C. "Proof may be made by testimony, 1 of all facts concerning commercial matters." 1233 C. C. "A trial by jury may be had in all actions founded on debts, promises or agreements of a mercantile nature, either between traders or between traders and non-traders, &c." 348 C. C. P. In notes on the insolvent act of 1864, Mr. Abbott, examining "who is a trader," says, that our laws respecting evidence in commercial cases and on the subject of trial by jury, have rendered it occasionally necessary to discriminate between acts and persons possessing a commercial character and the contrary. The learned author then proceeds to quote the old statutes, and to group the decided cases, two of which are not reported elsewhere.

A loan of money by a non-trader to a commercial firm is not a "commercial matter," or a debt of a "commercial nature," and is not, therefore, prescriptible by the lapse of either six or five years.

The prescription, under the Code, of five years against arrears of interest cannot be invoked in respect of a debt due prior to the coming into force of the Code. *Darling & Brown & al*, M. Judgment confirming 22 June 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 92.

The engagement by a Railway Company of a civil engineer for carrying out the works of a Railway Company, is a commercial contract, and may be proved by parol. *Legge & The Laurentides Railway Co.*, M. Judgment reversing 17 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 98, 3 Leg. News 23.

COMMISSION AGENT. *v.* MANDATE.

COMMISSION OF ENQUIRY.—At common law the Crown has no power to authorize commissions to enquire of any matter by examining witnesses under oath, or to compel the attendance of persons and the production of papers. In 1846, there was passed "an Act to empower Commissioners for enquiring into matters connected with the public business to take evidence on oath." 9 Vic., ch. 38. This Act was substantially incorporated in chap. 13, C. S. C. 31 Vic., c. 38. Under these Acts, the power is limited where such enquiry "is not regulated by any special law." See Todd, vol. 2, p. 345.

A commission appointed to make an enquiry into complaints made against a magistrate under the 32 Vic., c. 8, cannot be constrained by *mandamus* to furnish the party complained of with a copy of the accusations or to allow him to appear by counsel, or to cross-examine witnesses or to produce witness in his own behalf. *Belleville & Doucet.* Q. Judgment confirming, 4 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

COMMISSION MERCHANT.—A commission merchant who receives money as the price of wheat for a party for whom he deals has no right to pay it into his own account to be applied generally to the creditors of the purchaser. *Kershaw & Kirkpatrick et al.* Judgment confirming, September, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Confirmed in Privy Council.

COMMUNITY.—1260, 1268, 1270, 1323. —COMMUNAUTÉ. Immoveables acquired during marriage, in exchange for others which belong to one of the consorts, do not enter into the community, and are substituted in the place and stead of the immoveables thus alienated; saving

compensation if a difference have been paid. 1278 C. C.

So where a widow claimed her dower on real estate mentioned in her marriage contract, and charged with dower, which had been exchanged for other real estate, with her consent, her action against the *détenteur* will be dismissed. *Girouard & Trudel.* M. Judgment confirming, 25 January, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 4 Dec., d'A. 39.

When the surviving husband has not made an inventory within three months of the decease of his wife, there is continuation of community between him and his children.

Such continuation of community may be stopped by an inventory made in due form and closed in presence of a *légitime contradicteur. Côté & Côté.* Q. Judgment reversing, 8 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Monk, J. dis., probably owing to certain irregularities in making the inventory in the particular case, and not on the general principles enunciated here.

A tripartite community of property is dissolved by the death of the second wife if she dies without leaving any minor children, and the third share, of the second wife in an immoveable, purchased during the existence of such tripartite community, is a *propre* of the issue of such second marriage.

That the surviving husband has no right to alienate the third share of such immoveable after the death of the second wife, and the purchaser of the rights of the issue of the marriage, of age at the time of the mother's death, has a right to bring his action of *partage* of said immoveable. *Francœur & Mathieu.* M. Judgment reversing, 22 December, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 288, 8 Rev. Leg 665.

The *conquets* of a first marriage do not fall into the community of a second marriage under the law prior to the Code, and this is the interpretation that has always been given to the second paragraph of art. C. C. L. XXIX C. de P. This is a reserve, and not a restriction, and therefore, giving full effect to art. 764 C. C., the old law governs in cases where both marriages took place before the code.

As the *conquets* of the previous *communauté* do not fall into the second *communauté* with the second husband, it follows that such property is not conveyed by a bequest in these words: "*tous les meubles et immeubles dépendants de leur communauté et acquis par eux conjointement, de quelque qualité qu'ils soient, en quelque lieu qu'ils se trouvent et situés pour par lui en faire et disposer &c.*" *Pilon & Brunet et al.* M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The husband has no power to hypothecate an immoveable *conquêt* of the community, after the dissolution of the community, and a hypothec given by him at that time can only affect his half of the property.

The heirs-at-law of the deceased wife are seized by operation of law, of her share in such immoveable. (Art. 607 C. C.) *Dallaire & Gravel.* M. Judgment reversing, 21 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 286, 2 Leg. News, 15.

COMPENSATION.—"When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared." 1187 C. C.

The Defendant sued on two promissory notes pleaded compensation. Plaintiff replied setting up other indebtedness. *Held* that he should have set up his whole claim and compensation was maintained. *Gilbert & Lionais,* M. Judgment confirming, 27 January, 1876. Dorion C J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 7 Rev. Leg. 339.

H. gave the note of C. endorsed by H. to his creditor L. in payment of his debt; the note passed into the hands of T. wife of L., and she settled with C., the maker, for the note by deed passed before the institution of the action of L against H. *Held*, the debt of H. was paid and compensated by these transactions. *Lepage & Hamel*, Q. Judgment confirming, 8 May, 1884. Monk, Ramsay, Tessier, Cross, Baby JJ.

Distraction of costs was awarded to the Appellant's Attorney by a judgment of the Circuit Court. This judgment was confirmed in appeal with costs to the Appellant.

Held:—That to an execution by the Appellant, the Respondent could oppose, in compensation, a claim he had against the Appellant's Attorney to the extent of the costs in the Circuit Court, for which distraction of costs had been allowed, but not for those in appeal, which were awarded to the Appellant. *Logan & Kilgour*. M. Judgment reversing, 21 Dec. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ., Ramsay, dis. Rep. 3 Dec. d'A. 336.

A check is taken as cash, and generally payment of it cannot be refused on the ground that the person giving the check has other claims he might have set up against any claim of the person receiving the check, at the time it was given. But *vide* "Check." *Dorion & Dorion & e contra*. M. Judgment reforming, 17 November, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Dec. d'A. 389.

Where a lessee was entitled by a clause of the lease, to become proprietor of the premises leased on payment of a specified sum, that when sued in ejectment he could not plead that this sum had been compensated by damages suffered by him through the interruption of his business.

In any case the damages which a tenant can claim for non fulfilment of a condition of the lease must be the immediate and direct consequence of such inexecution, and will not include indirect losses, e. g. damages alleged to have been suffered owing to the lessees inability to fulfil contracts, or for waste of wood prepared for his business, *Bell & Court*, M. Judgment confirming. 21 January, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R., II. Q. B. 80, 9 Leg. News, 86.

Notes were placed by the bank Appellant in the bank Respondent for collection. Subsequently, and before the notes were due, the bank Appellant suspended payment. The insolvent bank, in liquidation, brought action for the amount collected, and was met by a plea of compensation setting up the liability of the insolvent for a note held by the Respondent. Reversing the judgment of the Court below, held that money collected after the insolvency could not be applied to the liquidation of a debt by the insolvent; for this would be a preference. It would have been otherwise if it could be shown that these notes had been given as collateral security at the time the debt by the Insolvent to the Respondent was created. *The Exchange Bank of Canada & The Canadian Bank of Commerce*. M. Judgment reversing, 27 May, 1886, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

COMPOSITION. *v.* ATERMOIEMENT.

The endorser of a composition note given by a debtor to his creditor in carrying out a settlement (not under the Insolvent Act) for fifty cents in the dollar, was not liable for the amount of such note, where it appeared that the debtor, for whom he endorsed the note as surety and from whom he had taken a transfer of his estate as collateral security, had secretly given the plaintiff (the creditor) his own notes for the balance of his claim, in order to obtain his assent to the composition, and the creditor had already received fifty cents on his claims. *Arpin & Poulin*, M. Judgment confirming 14 June, 1878 Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 331, 1 Leg. News 290.

The endorser of composition notes for an insolvent remains liable thereon, though the discharge of the insolvent may have been annulled by the Court, and though the insolvent may have given other notes by way of preference to other creditors. *Marchand & al. & Wilkes*, M. Judgment confirming 17 September, 1880. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J., dis., thought that the condition of the endorsation by the nature of the transaction was the discharge of the debtor, and that failing, by the act of the creditor the surety was discharged. Rep. 3 Leg. News 318.

The endorser of composition notes is not discharged from liability thereon by the mere fact that the compounding creditors have secretly stipulated with the debtor that he shall pay them an amount in excess of the composition rate, as the condition of their consent to the composition; and especially where the endorser, as the consideration of his endorsement, obtained a transfer of the insolvent's entire stock-in-trade and assets, which he still retained when sued on the composition notes. But the endorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes. *Martin & Poulin*, M. Judgment reforming 24 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Cross, J., dissenting, Ramsay, J., did not concur in some of the reasons given for the judgment, but concurred in the judgment because Poulin was in a peculiar position. If he were discharged he would be really keeping what he had gained by the transaction and be discharged from his his liability. Rep. 4 Leg. News 20, 1 Dec. d'A. 75.

Notes given in excess of the settlement agreed upon with the other creditors of an insolvent cannot be recovered on, even if it appears they were given to a consignor as the price of goods in the hands of the insolvent for sale. *Wilkes & Skinner*, M. Judgment confirming, 6 March, 1882. Monk, Ramsay, Cross, Baby, JJ.

CONCESSION. *v.* REGISTRATION.

CONGE DEFAUT. *v.* PROCEDURE.

CONQUETS.—This term differs from the term *acquet* in this, that the former is the acquisition of two or more persons, the latter of a single person. In their larger signification they include moveables as well as immoveables. D'Aguesseau, 4 Plaidoyer, N. Denisart, *v.* Acquets, Conquets. In the CCLXXIX article C. de P., "Conquets" was held to include all movables. Parlement de Paris, 4 March 1697. See d'Aguesseau 41 Plaidoyer. But in 1763 it was held that in a contract of marriage a donation of "conquets" did not include movables. N. Denisart, *V.* Conquet. In *communauté, conquet* is opposed to *propre*; but *propre* in treating of *communauté* is all that is not common. Pothier, Com. No. 105.

CONSENT.—Consent in its most technical sense is used in article 984 C. C., to express one of the "four requisites to the validity of a contract." There are certain well known difficulties as to the use of this word, which had troubled the legal mind before the "grammar of assent" saw the light. The phraseology of the Code indicates a sense of obscurity in declaring that the consent of parties must be "legally given." It does not tend to clear the matter up. The *consensus* of two minds in an abstract proposition is easily understood. It means that the minds of the persons who consent are in accordance. Consent in a contract means nothing of the kind. It is used figuratively, assuming the consent of the mind of a party to that to which he agrees. The distinction must be obvious even to those who never read "The Merchant of Venice." A. promises to pay B. a hundred *per centum* a year. In reality he is bound by his agreement, not by his consent. B. only assents to the proposition of A. *v.* Certiorari (waived by *consent.*)

CONSIDERATION.—A contract must have a lawful cause or consideration. 984 C. C. *v.* Contract.

CONSOLIDATION OF SUITS.—*v.* APPEAL.

CONSPIRACY.— *v.* DAMAGES.—CRIMINAL LAW.

CONTEMPT.—Contempt of Court, a branch of the law to which the judicial mind is disposed to consider there is no logical limit, and that its application is merely restrained by the conscience of the judge or of the tribunal. Like all disciplinary powers the power to punish for a contempt is discretionary, and therefore its application is to some extent arbitrary, as is sometimes seen. Discretion is not however a term without some measure. *Discretio est decernere per legem quod justum sit.* Maxim in 2nd Inst. The power to punish seems to be justly exercised to check by summary process what would, if tolerated, prevent the administration of justice. The most evident example is a disturbance of the proceedings of a Court of Justice. These cases are provided for by articles 4, 5, 6, 7, 8 and 9 C. C. P. There are, however, other cases not absolutely disturbances, but mere disobedience of the order of a Court, which fall within reach of punishment as for a contempt. The wilful failure to comply with the order of a writ of *Habeas corpus*, is a contempt of court, by Statute 1044 C. C. P. The rule of Practise of the Superior Court, of the 17 December, 1850, declares "That every wilful breach of an order or rule of practice of this court (for which no fine or other specific punishment is provided in the body of such rule or order) shall be considered a contempt of court, and punished accordingly." Wotherspoon's Manual, p. 234. This rule of practice can only be accepted in a very restricted sense. Article 2273 C. C. And so a contumacious disobedience to any one of certain orders is a contempt of court. Thus it is a contempt to fail to obey lawful process as for instance a Subpœna in any suit, or the summons to act as a juror. It is not a contempt of court to commit a crime, although it is a contempt of law and justice; nor is it a contempt not to satisfy a judgment, because *nemo precise cogit ad actum.* There are however exceptions to the generality of this rule, and in many cases a party is constrained by *corps* to the satisfaction of judgments. These cases are circumscribed by law, and are not governed by the discretion of the Court or Judge in the more extensive sense. The French term *rébellion à justice* making a distinction between disturbing the proceedings of a court, and resistance to its process, prevents misapprehension as to the real operation of the law. To confound, under one term the act of throwing a missile at the judge in court, and the failure by a tutor to pay over a *reliquat de compte* to his minor is not generalization but confusion. However the C. C. 2273, has allowed the confusion to creep into its French version, by translating the English word "contempt" by "*mépris*". This is much out of place, in a work, which, with almost aggressive nationalism, has given the French version a species of precedence over the language of the empire. The legislators of this province particularly will do well to read, and keep in mind, the short and judicious criticism by Mr. Lorrain in the Preface to his *Code de Procedure.* A similar criticism of the English version would not be less true. The fact is parliamentary law-making is a disastrous failure. The idea of the law is almost always a "notion", rarely a principle, and its execution is bad in England, worse at Ottawa and detestable at Quebec. *v.* Contrainte par corps.

A witness living in Montreal who has been summoned on Saturday night to appear in Sorel on Monday, will not be held to be in contempt of Court. *Barthe & Lajoie.* M. Judgment confirming, 21 September, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A person accidentally in a place other than his domicile, summoned to appear in a suit going on there *instanter*, will not be held to be in contempt of the Court if he declines to appear. *Barthe & Thibaudeau.* M. Judgment confirming, 21 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

While refusing obedience to an injunction and even using violence to

resist it, a party will be heard on an application to suspend the injunction. *Macdonald & Joly, et al.* M. Judgment, 21 Sep., 1878. Sir A A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Ramsay, JJ., dis. on the ground that the party could not be heard on the principal demand while in contempt of the order. Rep. 1 Leg. News 461.

A party filing an opposition *à fin d'annuler* cannot be imprisoned as for a contempt of Court until the opposition has been adjudicated upon. *Dawson & Ogden*, Q. Judgment reversing, 8 March, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

A person entitled to cut timber on a lot of land subsequently taken in execution, and who has no notice of the seizure and does not know of it, cannot be imprisoned under art. 646 C. C. P. for cutting wood on the land seized. *Coutier & Cinq-Mars et al.* Q. Judgment confirming, 5 June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The respondent sold machinery to Joseph Kieffer. This machinery was in the hands of a firm styled Kieffer Brothers, both of the parties being brothers of Joseph Kieffer. One White purchased the machinery from Joseph Kieffer, and Whitehead sought to recover the machinery alleging that his sale to Kieffer was a simulated sale. While this litigation was going on Whitehead obtained an order of a judge giving him provisional possession of the machinery. Disregarding this order the Kieffers and White had the property transferred to the possession of White. Whitehead then took a rule for contempt against them, on which they were condemned to restore the goods in three days. This order they again disobeyed. The majority of the Court decided that White should be fined $100 for his contempt, but that be should not be compelled to deliver up the machinery, because in another action, in which judgment was rendered on the same day as the judgment on the rule, the machinery was declared to be the property of White. Judgment condemning White in a fine of $200. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J., dissenting thought the judgment should be confirmed. The machinery was White's so far as an appealable judgment could make it so, but he had possessed himself of it illegally and he should not be allowed to profit by his wrongful act. It was an occasion to apply the rule, applicable in all possessory proceedings: "*Spoliatus ante omnia restituendus.*" Judgment 30 June, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J., dis.

A commitment for contempt during the pleasure of the court is illegal on its face and will be set aside on appeal. *Vineberg & Ransom & al*, M. Judgment reversing 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

CONTRACT.—Contract is declared by the Code to be one of the causes of obligations. "Obligations arise from contracts, quasi-contracts, offences and quasi-offences, *and from the operation of the law solely.*" 983 C. C. The words in italics are borrowed, not textually from Pothier. They do not appear in the Justinian compilations. There is but one text of ante-Justinian law, of unquestionable authority which deals with the division of obligations. It is to be found in the Institutes of Gaius III, 88: "*Quarum (obligationes) summa divisio in duas species deducitur; omnis enim obligatio vel ex contractu nascitur vel ea delicto.*" The form of the sentence indicates that the Justinian artisans were using the materials of Gaius to say something very different from what he had said. They make a "*summo divisio*" but it is to say that obligations are Civil or Pretorian, § 1. Then follows § 2: "*Sequens divisio in quatuor species deducitur, aut enim ex contractu sunt, aut quasi ex contractu, aut ex maleficio, aut quasi ex maleficio.*" The Digest treats the matter differently. "*Obligatione aut ex contractu nascuntur, aut ex maleficio, aut proprio quo eam jure ex variis causarum figuris.*" D. 44, s. 7, 2, 1, § 1. This text is also attributed to Gaius, lib. 2, Aureorum. It is difficult to believe that

Gaius stated two things so totally different; but it has been suggested that the obligations arising *ex variis causarum figuris* were those classified in the Institutes of Justinian as *quasi ex contractu* and *quasi ex delicto*. This may be a good reason for changing the text of Gaius to be used in the Digest, it does not show that these last words were not an interpellation of the text. It has been further remarked that Cujas had not questioned the four fold division of the Institutes or the loose classification of the Digest. This remark seems to be well founded; but we should not fail to notice, that Cujas deals distinctly with the obligations arising *ex contractu* and those arising *ex maleficio*, but he is silent as to the others. Again he says: "*Actio aut ex delicto nascitur, aut ex contractu* 3 c. 388, A." He may very well have been dealing with the Justinian law as he found it, and that he saw no necessity in pointing out abstract propositions at variance with the authoritative expression of the law. It is also not altogether unworthy of notice that Cujas, perfectly consciously, used obligation as practically equivalent to contract. When Pothier came to deal with obligations, he at once made it clear that *obligation* and *contract* were not co-extensive. But he was dissatisfied with the four fold division and he added a fifth, which has been adopted by the Code.

It seems to me that Gaius in his institutes laid down the true classification as far as regards the *summo divisio*, and that he went no further; therefore the text attributed to him in the Digest was altered to support the four fold division. The ante-Justinian doctrine appears to have had in view the following classification:

Obligations arise,—

(*a*) *Ex contractu.*
1. *Re;*
2. *Verbis.*
3. *Litteris.*
4. *Consensus.*
5. *Ex delicto,*

(*b*) We may further distinguish malicious delicts, and the lesser wrong-doing attributable to negligence or inadvertance.

This classification is complete, as will readily be seen if we reject the idea of consent being a necessary ingredient of the obligation *ex contractu*. The older idea was this, persons are contractually obliged by their deed, formally by words or by writings, and even by acquiescence (*consensus*). When the contract became limited to a regular bargain, *consensus* was easily generalized to cover every expression of assent. But the Act, (not a consent express or implied), to which the law attaches an obligation, was not provided for. Hence we have the obligation, which binds exactly as a contract binds to complete this part of the system. The other part is the obligation arising from misdeeds. In these no reciprocity of sentiment can be presumed. A good *summa divisio* of obligations would be: (a) those arising from *will* express or implied, and those arising against the *will* of the parties obliged.

As to obligations arising from the operation of the law solely, I confess to being unable to place this category in any *summa divisio*. It is also an unmeaning phrase. All obligations arise from the operation of the law solely. "*fundamentum obligationis est lex.*" Heinecius *Recitationes*, § DCCLXIX. If however, it is intended to classify the kinds of law which create obligations by giving constructive force to acts, then it is evidently a secondary division of the obligations *ex quasi contractu*, for instance, arbitrary laws declaratory of rights. But this is not exactly what Pothier means. Obl. 123.

The report of the codification commissioners on the title of obligations has purposely avoided any discussion of these classifications.

Evidence of the rates of value for certain supplies to be furnished, will not be sufficient to establish a contract between Plaintiff and Defendant; though

it may possibly be sufficient as a *commencement de preuve.* (1)

Meigs et al. & Foster. M. Judgment confirming, 22 December, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

NOTE.—Dorion C. J., was absent at delivery of Judgment, and took no part in *délibéré*, being then administrator of the Government of Quebec.

Privity of contract is not a technicality of our law. A creditor, to save a circuit of actions, may under our law, sue the debtor of his debtor.

The sale of certain things, and the obligation to pay certain debts, together with the good will of the business will be interpreted as an undertaking to pay a draft given to a bank and not necessarily mentioned in a schedule as part of the transactions, or by the Defendant known to be part of the transactions in question. *Hood & The Bank of Toronto.* M. Judgment reversing, 19 June 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk & Tessier, JJ., dis. Rep. 3 Leg. News 234.

The parties and one Angus MacDonald tendered for the construction of the graving dock at Quebec, which included the dredging, masonry and other works. On a second tender the works were awarded to Peters, and the Respondents obtained a contract for the dredging through Peters, but directly from the Government.

Held:—Reversing the judgment of the Superior Court: That although there were no articles of partnership signed between the parties, from their correspondence it appeared that all were to have a share in any contract they might obtain, either for the whole work, or for any portion of it, and more specially for the dredging, whether such contract was obtained directly from the Government or as a sub-contract; and that Appellant was entitled to claim damages from the Respondents for their refusal to acknowledge him as a partner in the contract for the dredging. *Kane & Wright et al.* Q. Judgment delivered in M. 21 Dec. 1880, reversing. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 297, 4 Leg. News 15.

(1) *Query.*—Is a contract to construct part of a railway, a commercial matter?

Where a contractor undertook to put in pipes and a heating apparatus, and by letter assured the party for whom the work was to be done that it will not exceed that amount ($225), but may fall considerably below that figure without registers. The registers will amount to about $75 extra and added "I again mention that we think the figures given will exceed the ultimate cost," the charge of the contractor will be limited to the amount mentioned. *Gurney et al. & Nordeimer.* M. Judgment confirming, 17 Dec. 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby JJ., Monk, J., dis.

Where a party has received goods by transfer in the books of the Custom House and does not refuse to take them over till long after, and till the price has fallen he cannot repudiate his contract. *Dufresne et al. & Ross et al.* M. Judgment confirming, 16 March 1877. Monk, Ramsay, Tessier, Sicotte, Bélanger, JJ.

Where under a contract Defendant received twelve bonds from Plaintiff as security for the performance of an obligation to pay Defendant ten thousand dollars, it being stipulated that on receipt of the said amount the twelve bonds should be returned to Plaintiff, the ten thousand dollars being paid to Defendant, he cannot question Plaintiff's title to the bonds. *Baylis & Drummond.* M. Judgment reversing, 21 December 1876, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Dorion, C. J. absent at judgment. Confirmed in Supreme Court. Rep. 2 Sup. Court R. 61.

A Steamship carrying passengers and a valuable cargo, from Liverpool to Montreal, having lost her screw, and having been six days under sail, was in

the Gulf of St-Lawrence near a dangerous coast, and exposed to peril.

Held :—That an agreement made by the captain to pay £800 sterling for towage into Gaspé Harbor (a distance of about 50 miles) should be enforced, seeing that the service might properly be treated as salvage, and as such was worth at least the sum fixed by the agreement. *Stuart & Brewis.* M. Judgment confirming, 20 June 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby JJ. Ramsay, J. *dub.* Rep. 26 J. 14. 4 Leg. News 203. Dec. d'Ap. 319.

The Respondents sold to the Appellant from 300 to 350 tons of coal subject to the condition that "if at any time the operations or business of the Company at the mines or on its Railways or Canals were interrupted by floods, etc.—or by strikes among the miners, etc.—the obligations of the Company to deliver coal under its contract or agreement may be cancelled, at the option of the Company, and the Company shall not be liable for damages by reason of such non delivery."

Held :—1o That an interruption in the operations of the Company, caused by a strike among the miners, which lasted from the 25th of July to the 15th of October, although began at the date of the contract, was such an interruption as justified the Company in cancelling the contract.

2o That although the Company might have procured coal elsewhere to fulfil its contracts, it was not obliged to do so.

3o That no demand or judgment was required to cancel the contract, which was cancelled by a mere notice given by the Company. *Mason & Delaware, Lackawanna & Western Railway Co.* M. Judgment confirming, 2 Feb. 1881. Sir A. A. Dorion, C. J. Monk, Ramsay, Cross, Baby JJ. Rep. 1 Dec. d'A. 204.

A property was sold "free and clear of all incumbrances whatsoever, save and except a vendor's privilege for $5,250 in the heirs McKenzie" which the vendors by the deed of sale undertook to pay, and have a discharge thereof duly registered.

The above clause being equivalent to a stipulation of *franc et quitte*, satisfaction thereof was a condition precedent to the institution of an action for the purchase money or any portion thereof, or for arrears of interest.

The purchaser, sued for an instalment of the purchase money, properly pleaded the vendor's default to fulfil the condition, by an *exception temporaire.*

The purchaser, in order to be in a position to claim damages for non-satisfaction of the cause of *franc et quitte*, should put the vendor *en demeure* to remove the incumbrance, and allow a reasonable delay for doing so. *Law & Frothingham.* M. Judgment reversing, 9 February, 1881, Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, Caron, J. dissenting. Reported 25 J. 172. 4 Leg. News, 67.

Where on a contract for railway work the price of which it is stipulated shall be paid on progress estimates and according to a specified scale of prices, and where the contractors have not finished their contract within the period fixed, being delayed and stopped by the other contracting party, the contractors may sue on the contract for the excess of the work done by them over and above what has been paid on the progress estimates. *McGreevy & Beemer et al.* Q. Judgment reversing as to amount, 7 June, 1879. Sir A. A. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 9 Rev. Leg. 587.

Where a butcher contracted to supply meat to an hotel, subject to the approval of the steward of the hotel. T. the steward is dissatisfied with the meat he can terminate the contract, being sole judge of the quality of the meat, and the butcher will lose his deposit. *Brown & Allan et al.* M. Judgment confirming, 21 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ., Ramsay, J. dissenting was of

opinion that the Hotel Company could not break the contract without putting the butcher in default to give better meat, and without evidence to show that the meat was bad. The evidence showed that the meat was generally good and there was no special evidence to show that the meat was ever defective.

The question was whether the measurement of stone should be before or after it was broken. *Held*, that although the general practice was to measure it after it was broken, yet the circumstances might lead to a different inference, and as the only trust worthy measurement in this case was made before the stone was broken, and the matter was determined in favor of that measurement by the inspector named under the terms of the contract to settle the value of the work, the contractor was bound by that measurement. *Rae & La Compagnie du Chemin Macadamisé de Laprairie.* M. Judgment confirming, 23 Septembre 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Reported 7 Leg. News 307.

Appellants sought to contract with a railway company for 50,000 railway ties. Respondent was also desirous of supplying the railway with these ties. Appellant then agreed with Respondent that if he should not seek to get the contract they would give him one cent a tie on the 50,000 ties. On this Appellants got the contract and gave to Respondent this receipt:

Montreal, 7th November, 1881.

Please pay Michael Leonard the sum of one cent per tie on the fifty thousand contracted for this day under and subject to the conditions of the said contract bearing date and executed before J. S. Hunter, Notary.

To the Central Vermont Railroad.

GEORGE ST. ARMAND,
L. A. ROBERGE.

The transfer was accepted but Appellants failed to deliver more than 11,000 ties, and the company were not bound to pay Leonard. Respondent then took out an action against Appellants, who pleaded that amongst other things they had agreed with the railway company to discontinue the contract, the company being disatisfied with the ties. *Held*, that this was not an answer to the Respondent's action. *St. Armand et al. & Leonard.* M. Judgment confirming, 9 December, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Where a contract to supply flour was transferred to another firm, and they agreed to carry on the business on condition of cash on delivery or security on draft at 30 days, no action will lie against the second party for insisting on these conditions although they were not shipped by the party originally applied to. *Tourigny & Wheeler et al.* Q. Judgment, 7 May, 1884 Monk, Ramsay, Tessier, Cross, Baby, JJ.

The appellants contracted to supply an engine to respondent's yacht for $2000. The engine was not according to specification, and certain important portions valued by experts at $225, were omitted. To a suit for the price of the engine the respondent pleaded such omissions and set up damages resulting from appellants delay in completing their contract, which damages were proved at $750. Pending the proceedings the yacht was seized and sold by respondent's creditors. *Held*, that as such sale rendered it impossible for appellants to complete their contract, and respondent had profited to the extent of the extra value added to his yacht by their work, they, the appellants, must recover for the value of such work, less the omitted portions $225 and the damages suffered by respondent $750. *Carrier & Bender*, Q. Judgment reversing 6 February, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 12 Q. L. R. 19.

Evidence as to a contract for timber. *Desrosiers & The Montreal & Sorel Railway Company*, M. Judgment reforming 22 March, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Where part of a contract is executed the contractor may claim for what he has performed although it be stipulated that payment was only due on the execution of the whole contract.

Appellant sold to respondents a quantity of tea to arrive. The tea arrived promptly and was placed in a warehouse to the order of respondents. It seems the tea was all in the warehouse on the 14th October. On the afternoon of the 15th, by a letter dated the 14th, respondents notified the appellant that the tea had arrived too late and that respondents would not take the tea, unless appellant was prepared to alter the terms of payment. This appellant immediately refused to do and directed the ware-houseman not to deliver without being paid in cash. Respondents, without withdrawing their refusal to take the tea, in appellant's absence demanded a sample, which was refused. Respondents then wrote to appellant to say that the transaction was at an end appellant having failed to carry out his part of the bargain. Appellant then sold the tea after notifying respondents and sued for the loss by the second sale. *Held*, reversing the judgment of the Court below, that it was respondents who failed to carry out the bargain, that they never having withdrawn their letter of the 15th, appellant was justified in directing the ware-houseman not to deliver without payment in cash, and that appellant had a right to sell the tea, after notifying respondents on the best terms he could get. *Cox & Turner & al*, M. Judgment reversing 25 September, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ.

Par un engagement par écrit entre l'appelante Mlle O'Keefe et l'intimé en cette cause, celui-ci s'est obligé à fournir de l'ouvrage (knitting) à l'appelante pendant l'espace de neuf mois depuis le 4 Juin 1883. L'ouvrage n'a pas été fourni, et l'appelante réclame des dommages de l'intimé pour inexécution de contrat.

Jugé:—1o. Que l'écrit en question ne mentionnant pas si l'intimé devait apporter l'ouvrage chez l'appelante ou si l'appelante devait aller le chercher à l'établissement de l'intimé, l'appelante était tenue, d'après l'usage généralement suivi dans de semblables contrats d'aller le chercher chez l'intimé. en temps utile, et que, comme elle ne s'est pas conformée à cet usage, elle n'a droit à aucuns dommages de l'intimé.

2o. Que dans l'espèce la preuve testimoniale serait illégale pour suppléer à cette lacune du contrat. *O'Keefe et vir, vs. Desjardins*, M. Judgment confirming 21 January, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 4 Dec. d'A. 300.

Where a contractor, *homme de l'art*, undertakes to put a roof on a house, and the roof is insufficient to keep out the rain, he will be responsible for the costs of renewing the work, if he neglects or refuses to repair after notice. *Malo & Melançon*. M. Judgment confirming 17 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dis. Rep. 3 Leg. News 42.

Destruction of unfinished work. The plaintiff was a contractor under obligation to build an addition to defendant's house. While the work was going on and before it was entirely finished the house was destroyed by fire and the addition was injured. The defendant thinking the new building now useless abandoned the contract, and refused to pay the contractor beyond the value of the work not injured. *Held* that he was liable for the whole work done, and that the loss of the injured building must fall on the owner. *Boudreault & Sulte*. Judgment confirming 4 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The transfer of an executory contract by an insolvent is not necessarily fraudulent. *Bernier & Doyon*, Q. Judgment confirming 5 June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A stipulation to the following effect :

"And it is hereby further agreed and declared by and between the said parties that the aforesaid vessel and her freights shall at all times be kept insured by the said G. B. T. & Co., their *executors, agents or assigns, to at least the amount of the advances made by them in respect thereof, and to such further reasonable amount as he, the said Jean Elie Gingras, may see fit, and the premium of such insurance shall be deducted from and out of the monies arising from the said premises,*" is an undertaking to insure for the advances contemplated by the deed and for such further reasonable amount as the other party may seem fit to demand. It does not oblige the promissor to insure for other advances relative to the same vessel upon another contract, unless the owner shall see fit to demand it. *Symes & al., & Gingras,* Q. Judgment reversing 8 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

CONSIDERATION.—The consideration of a contract, which appears to be that the Plaintiffs were to exercise personal influence to facilitate the reception of Defendant's work by the Government engineers and others, is *contra bonos mores* and will not be maintained. *Foote & The Ontario Car Co.* Q. Judgment confirming, 6 March, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The Appellant was prosecuted for an alleged misdemeanour being an infraction of the banking Act. He communicated his troubles to a friend, the President of the Bank of Montreal, who, it appears, advised him to disinterest the prosecutor, and intimated he could procure the necessary funds of the Bank of Montreal. Appellant followed his advice, and procured discount on his own note at the Bank of Montreal. When the note fell due Appellant declined to pay it, and, being sued, he pleaded that the President of the Bank and the Manager were aware that the money advanced on the note was to be used to buy off a prosecution, that this constituted an illegal consideration for the advance, and that Respondent could not recover. *Held,* that the knowledge of the President and Manager, if established, could not effect the right of the Bank. *Rankin & The Bank of Montreal.* M. Judgment confirming, 27 Nov., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ.

A contract for a lawful consideration is not the less valid though the consideration be incorrectly expressed therein. *O'Brien & Thomas.* M. Judgment confirming, 16 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 54 J. 43.

By contract between a builder and the syndics for building a church, the latter agreed to pay the former the balance owing to him before it was due, for a discount of 10 *per centum.* On this agreement the builder received $3411.63 and gave the syndics a discharge. On reflection he found that the calculation was based on a false principle, and that by the mode of dealing with the figures he had been made to pay for some of the instalments instead of getting anything from them. *Held,* that the interpretation given to the contract, and which was not contradicted by its terms, could not be disturbed. *Allard & The Syndics of the Parish of St. Bridget.* M. Judgment confirming, 27 Nov., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay and Tessier, JJ., dis.

When there is a stipulation that a contractor shall only be paid on the certificate of the employer's engineer, it is not an answer to the action of the contractor to plead that the certificate has not been furnished.

To take advantage in any way of such stipulation, it should be specially pleaded.

The stipulation that an employer may "for ever retain the reserved percentage on account of the consideration for damages which may have been sustained by reason of the forfeiture of this contract," cannot be interpreted to mean that he has a right to retain the 15 *per centum,* if there be no damages

or any part of it not compensated by damages.

An employer is not justified in taking the works out of the hands of a contractor owing to his not having fulfilled his contract within the time specified, if the failure to carry out the contract be due to the fault of the employer, and if he does so it is at his own risk. *McGreevy & Marchand.* Q. Judgment confirming, 8 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 16 Rev. Leg. 157.

The tariff fixed by the Board of Trade for receiving timber in the coves, although not absolutely binding in law will be taken as a fair and reasonable rate, in absence of other evidence. The tarif having been changed to the knowledge of both parties, any transactions between them as to receiving timber at a lower rate, will not be presumed to be an understanding that all future charges shall be at the same rate. Under any circumstances even if such an understanding existed, it would not affect the timber in question, which was not placed by respondent in appellant's cove, but was purchased by him after being placed there. *Stevenson & Burstall,* Q. Judgment reversing 6 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 3 Rev. Leg. 190.

Where a contractor fails to fulfil his contract, which is taken from him under a stipulation of the contract, and where it appears the other party has profited by the contract to an extent greater than the amount paid to the contractor, the latter may recover the amount by which defendant has benefited. *Lacroix & al, & The City of Montreal,* M. Judgment reversing 22 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 52.

Lorsque des travaux ont été terminés postérieurement à la date où, suivant le contrat, ils devaient l'être, la prescription ne court contre le constructeur pour le paiement des dits travaux, que du jour de leur effection complète.

Dans un contrat, lorsqu'il est stipulé que l'obligé de faire, au cas où il aurait à se faire indemniser un surplus par l'autre partie, sera tenu de faire reconnaître son droit à telle indemnité par un agent nommé à cet effet, l'indemnité ne sera due qu'en autant qu'elle sera reconnue par tel agent ou, à défaut de telle reconnaissance, en autant qu'il en sera fait une preuve évidente et conclusive.

Spécialement, celui qui entreprend de construire un chemin de fer dans un délai déterminé, n'a pas le droit à une indemnité pour les dommages qu'il a soufferts, après l'expiration du délai convenu, par suite du passage de convois sur le chemin non encore terminé. *McGreevy & McBarron,* Q. Judgment reversing 8 October, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ., dissenting. Rep. 14 Rev. Leg. 422.

L'hypothèque acquise d'un commerçant dans les trente jours qui précèdent sa faillite est nulle de plein droit, même si l'acquéreur de cette hypothèque ignore son insolvabilité à l'époque de la transaction. (Art. 2023 C. C.) (1) *Rouillard & Lapierre.* M. Judgment confirming, 26 September, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 4 Dec. d'A. 286.

M., against whom a *capias* had issued, deposited a cheque in the hands of appellants, the agreement being that if he appeared with his bail at their office by eleven o'clock on the following morning the cheque was to be returned; if he did not appear, the cheque was to be applied to the payment of debt and costs. There was a conflict of evidence as to whether M. appeared at eleven or a few minutes after, and (as the majority of the Court viewed the evidence one of the bondsmen agreed upon was not present.

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(1) Hypothec cannot be acquired to the prejudice of existing creditors upon the immoveables of persons notoriously insolvent or of traders, within the thirty days previous to their bankruptcy.

Held: (by the whole Court)—That a difference of a few minutes in a contract of this nature was too slight to be material, and would not have justified the application of the cheque to the payment of the debt and costs, if M. had appeared with his bail as agreed; but *held* by the majority of the Court, that the absence of one of the bondsmen was a non-compliance with the agreement, which justified the application of the cheque to the payment of the debt and costs. *MacMaster & Moffat.* M. Judgment reversing, 26 May, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Sir A. A. Dorion, C. J., Cross, J., dissenting Rep. M. L. R. I. Q. B. 387. 4 Dec. d'A. 238.

CONTRAINTE PAR CORPS. — Title XX of the third book of the civil code deals in seven articles with "Imprisonment in civil cases."

"Imprisonment under a judgment rendered in a civil action is not allowed, except against the persons and in the cases specified in the following articles. C. C. 2271.

"The persons liable to imprisonment are: 1. Tutors and curators, for whatever is due by reason of their administration, to those whom they represented;

2. Any person indebted as sequestrator, guardian or depositary, sheriff, coroner, bailiff, or other officer having charge of moneys or other things under judicial authority;

3. Any person indebted as a judicial surety, or for the purchase of property or effects, moveable or immoveable, sold in execution of the judgment of a court;

4. Any person indebted in damages awarded by the judgment of a court for personal wrongs, for which imprisonment may by law be awarded;

5. Any person sued in damages under the provisions of chapter 47 of the Consolidated Statutes for Lower Canada, and against whom judgment has been rendered for such damages with condemnation of imprisonment. C. C. 2272.

"Persons are also subject to imprisonment for contempt of any process or order of court, and for resistance to such process or order, and for any fraudulent evasion of any judgment or order of court by preventing or obstructing the seizure or sale of property in execution of such judgment." C. C. 2273.

"Any debtor imprisoned or held to bail, in a cause wherein judgment for a sum of eighty dollars or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property for the benefit of his creditors, according to the rules, and subject to the penalty of imprisonment in certain cases, provided in chapter 87 of the Consolidated Statutes for Lower Canada, and in the manner and form specified in the Code of Civil Procedure." C. C. 2274.

"When the statement and declaration of abandonment are made without fraud, as specified in the last preceding article, the debtor is exempt from arrest and imprisonment by reason of any cause of action existing before the making of such statement and declaration, unless such debtor is arrested and imprisoned for any debt of the description specified in articles 2272 and 2273. C. C. 2275.

A *gardien* who has not signed the *procès verbal*, (unless it be mentioned that he cannot sign, 560 § 5 C. C. P.) cannot be *contraint par corps* for failure to produce the goods seized. *Hamel & Marchildon.* Q. Judgment reversing, 8 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 245.

A guardian will not be obliged to pay the costs of a contestation arising as to the ownership of the goods by one who is not the debtor His obligation is to produce the goods or to pay what is due by the debtor to the seizing creditor.

It is not necessary in the rule to offer the alternative of paying the value of the goods.

The guardian can relieve himself at any time by paying the value of the goods. *McCaffrey & Claxton & al.* Judgment reversing 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Dorion, C. J., dis. Rep. 3 Leg. News 292, 25 J. 191.

Contrainte par corps cannot be adjudged against a *tiers-saisi* who declared that he owed nothing, and who on contestation is condemned to bring back a piano he bought in fraud of the creditors, or to pay the debt. Article 616 C. C. P. does not apply to such a case. (1) *Racine & Kane*, M. Judgment reversing 19 January, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 346.

CONTRE LETTRE.—Where Plaintiff by a *contre-lettre* acknowledged to have purchased for account of Defendant certain property, and obliged himself to give a deed to Defendant on payment of different sums of money, and where Defendant has failed to make such payments or in any way to fulfil his obligations to Plaintiff, the latter may bring suit to set the *contre-lettre* aside. *Jones & Hall*, Q. Judgment confirming 5 September, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Where a land is sold, and the purchaser gives a *contre-lettre*, by which he undertakes to pay certain debts of the vendor, and when re-imbursed he will give back the land, and this without fraud, and that he has paid part of the amount stipulated, other creditors of the vendor cannot demand that the land should be returned without disinteresting the purchaser. *Macdougall & al, & Gendron & al*, Q. Judgment

(1) The effect of seizure by garnishment is to place the effects and debts of which the garnishee is debtor under judicial control, and to sequestrate in his hands all corporeal things in the same manner as if he had been specially appointed guardian.

reversing 8 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ., dissenting.

CONTRIBUTORY. *v.* CORPORATIONS.—JOINT STOCK COMPANY.

CONVICTION. *v.* CRIMINAL LAW.

CORPORATIONS.—A corporation is an artificial person. C. C. 552.

It is either aggregate or sole. C. C. 354.

It is religious or secular. C. C. 355.

Religious corporations are all public. C. C. 355.

Secular corporations are either political or civil. The former are all public ; the latter all private. C. C. 355, 356.

Municipal corporations, are political. They are constituted by particular charters or by the municipal Code. They have a limited power to make laws, styled by-laws.

Civil corporations are frequently composed of persons holding shares or stock, and such corporations are commonly designated as joint stock companies, and they are sometimes described as proprietary companies, to distinguish them from those that have no speculative character.

Other civil corporations have no share-list, nor, properly speaking, any commercial object. The individual interests of the members are of a subordinate character, and are mostly merged in the collective objects of the whole body. They are commonly styled associations.

The by-laws of civil corporations have no general authority over those who do not explicitly or implicitly subject themselves to their operation.

Dues exacted under a by-law that is illegal, or illegally under a by-law made within the powers of the corporation

may be recovered back. *The Corporation of the Town of St. John & Bertrand & al*, M. Judgment confirming June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Art. 705 of the municipal Code cannot be so interpreted as to extend to by-laws made beyond the powers of the municipality, but must be interpreted to cover irregularities in the making of by-laws within the powers of the municipality. So when a municipality enacted from a person the amount of a licence for the sale of spirituous liquors, under a by-law made in violation of the terms of a Statute forbidding municipal corporations to exact such licences the person paying for such licence may recover back the sum so paid. *La Corporation de la Ville de St-Germain de Rimouski & Rinfret*, Q. Judgment confirming 4 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 115.

Corporations will be enjoined not to collect monies under an assessment roll informally made. *Morgan & Côté* M. Judgment reversing, 22 Junr, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Dis. Sir A. A. Dorion, C. J. and Tessier, J, Rep. 3 Leg. News, 274.

And where money has been paid under such illegal assessment roll it may be recovered by action. *Lussier & Corporation of Village of Hochelaga*, " Also *Valois & Commissaires d'Ecole pour la municipalité d'Hochelaga*. Rep. *Ib.*, 277.

A municipal corporation may be called in *en garantie* by a proprietor whose land has been sold for taxes not due. *Wurtele et al. & The Corporation of the Township of Grantham*. Q. Judgment reversing, 5 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Sanborn, J., dis. Rep. 6, Rev. Leg. 547.

The statute allowed the corporation to tax all pedlers or petty chapmen, (*colporteurs ou marchands ambulants*)

bringing for sale into the city any articles of commerce, &c. Under this authority the Appellants passed a by-law imposing a tax of 810 upon all strangers and non-residents, who should come into the said city to sell or offer for sale goods by sample, card or other marks. The Respondent, a commercial traveller, having offered goods for sale on sample, but made no sale, was condemned to pay the said tax, and distress was taken against his effects. He resisted the seizure, on the grounds that the by-law was illegal, as being in restraint of trade, as discriminating between residents and non-residents, and as not following the terms of the statute.

Held, that the conviction was right, and the by-law valid and binding.

It is not necessary that the delegated power to pass a by-law for a particular purpose be exercised in the express terms of the law; it is sufficient if the terms of the statute be substantially followed, and in the present case the Respondent was within the fair meaning and intent of the Act a *colporteur* and *marchand ambulant*. And it made no difference that he did not sell, but only offered for sale.

Discrimination in taxation, as between residents and non-residents, is only an objection when it is unjust and oppressive, which was not the case with the by-law in question. Nor was it a by-law in restraint of trade. *Corporation of Three Rivers & Major*. Q. Judgment reversing, 7 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice & Cross, dis. Rep. 8 Q. L. R. 181, 11 Rev. Leg. 238.

The Corporation of Three Rivers is authorised to seize and sell the moveables of any proprietor for the tax for water supplied to the lessee of such proprietor. *The Corporation of Three Rivers & Malhiot*. Q. Judgment reversing, 7 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Cross and Baby, JJ. dis.

A municipal corporation is authorized

to amend its assessment roll without being called upon so to do. Art. 734, C. M.

And such corporation may cause to be estimated for the purposes of taxation the buildings, works, machinery and improvements on the property. Art. 719., C. M. *Montreal Gas Co. & The Corporation of the Village of Hochelaga.* M. Judgment confirming, 17 Dec., 1883. Sir A. A. Dorion, C. J.. Ramsay, Tessier, Cross, Baby, JJ.

A corporator who alleges that he is suffering an actual injury from the unauthorized acts of a corporation may institute an action in his own name, without the intervention of the Attorney-General, to restrain such unauthorized action.

But the enactment of a by-law by a corporation, which by-law was only to take effect after being ratified by the municipal electors, cannot support such action by a corporator before the by-law has been ratified.

Section 54 of 14 and 15 Vict. c. 128, restricting the borrowing powers of the Corporation of Montreal to £150,000, does not apply to subscriptions for railway purposes.

A by-law of the Corporation of Montreal, for taking stock in a railway, was properly submitted to the qualified electors generally, (under 35 Vict. C. 32, s. 2) the provision of the Municipal Code, Art. 497, not applying to cities and towns incorporafed by special Act.

The Act of the Quebec Legislature 36 Vict. c. 49, was not unconstitutional. *Molson & The Mayor &c. of Montreal.* M. Judgment confirming, 27 Jan. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ., Monk and Ramsay, JJ. did not concur in all the *considérants* of the judgment. They thought that the by-law, illegal in the commencement, had been rendered valid by the subsequent legislation. They were therefore of opinion that costs should not be given against the Appellant, at all events in the Court below. Rep. 23 J. 169, 9 Rev. Leg. 650.

Where under a by-law of a municipal corporation a special assessment has been levied for an improvement on one of the parties specially benefitted thereby, and the party has paid without protest, an action will not lie to recover back the money owing to irregularities in the proceedings. *Bain & The City of Montreal.* M. Judgment confirming, 19 Jan. 1832. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 76, 2 Dec. d'A. 221.

NOTE.—Confirmed in Supreme Court 8 S. C. Rep. 252.

The vendor of a house is obliged to warrant the purchaser from loss owing to the drains being in a bad state and not in accordance with the municipal by-laws, provided such purchaser was not aware of the defect at the time of sale. *Ibbotson & Ouimet.* M. Judgment reversing, 21 Dec. 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn. Tessier JJ. Rep. 21 J. 53.

The powers of a municipal corporation to expropriate must be exercised in conformity to law *à peine de nullité.* So the formalities prescribed by a Statute for the opening of a road, and for the expropriation of the owner, must be followed, and a municipality failing to observe such formalities will be condemned to restore the land, and pay damages, although the formalities neglected have been observed after action brought. That the right of a corporation to enter upon lands depends on the prior evaluation. *The Corporation of the Township of Nelson & Lemieux.* Judgment confirming, 16 September 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Rep. 2 Q. L. R. 225.

The general power conceded to a municipal corporation to expropriate for the purpose of opening streets, is not to be interpreted so as to over-ride a statutory power, previously conceded. to hold certain land for the purposes of a work of public utility, such as a bridge. *The Mayor &c. of Iberville & Jones et al.* M. Judgment confirming,

22 June 1880. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 3 Leg. News 277.

When debentures are issued under a By-Law, sanctioned by the Lieutenant-Governor in Council, the municipality charged will not be allowed to traverse the fact that the By-Law was duly passed. The municipality charged has its recourse against those who have wilfully joined in the illlegality if any has been committed. *Corporation of St-Guillaume & Corporation of Drummond.* Q. Judgment confirming, 5 June 1876. Dorion, C. J., Monk, Ramsay, Tessier, McCord JJ. 7 Rev. Leg. 721.

By an act of the legislature of Quebec (44 and 45 Vic., c. 40) it was enacted sect. 2: " In constructing said line, the " said Company shall be bound to con- " tinue from the present terminus of the " said Levis and Kennebec Railway, " in the parish of Notre-Dame de Lévis, " into Notre-Dame ward in the town " of Lévis, and erect a station there, " thence traversing Lauzon ward, in " the said town of Lévis, and the " villages of Bienville and Lauzon, to " arrive at deep water in said Lauzon " ward; provided that within thirty " days from the sanction of the present " act, the Corporation of the town of " Lévis furnishes the said Company " with its valid guarantee and obliga- " tion to pay all excess over thirty " thousand dollars *of the cost of expro- " priation for the right of way upon " the said described route*, in so far as " said route traverses the parish of " Notre-Dame de Lévis, Notre-Dame " and Lauzon wards, in the town of " Lévis, and the villages of Bienville " and Lauzon, following the brown line " shown on the plan of the said Com- " pany, to be deposited for reference " in the Public Works Department of " this Province, to the point of inter- " section with the red line upon said " plan."

The town council passed a by-law to the following effect: " The Corporation of the said town fully appreciating the value and advantage which will accrue to it by the said act, and in order to give effect to it (the Corporation) engages by these presents to pay, and guarantee to pay to the said Company, the whole cost over and above the thirty thousand dollars expropriation, for right of way on the line mentioned in said act, providing the said line mentioned in said act, passes through the parish of Notre-Dame de Lévis and Notre-Dame and Lauzon wards, in the town of Lévis, and the villages of Bienville and Lauzon, according to the brown line marked on the plan deposited as aforesaid, *just to the point of intersection with the red line on said plan.* The whole such as shewn in the said plan at the time of the passage of said act, *and according to the breadth and depth* at that time estimated and reported on by the engineers of the grounds to be expropriated on said survey. The present obligation and guarantee must be applied to and cover the cost of expropriation of the necessary ground, to erect a station of the said road, such as projected, in Notre-Dame ward of this town."

(Signed,) " GEORGE COUTURE,
Mayor."

Held by this Court that the municipal council of the town of Levis had the authority to pass a by-law to bind the corporation under the provisions of the statute above referred to, and that the by-law in question was conformable to the said Statute. *The Corporation of the Town of Levis & The Quebec Warehouse Company*, Q. Judgment reversing 7 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Tessier, JJ., dis.

A municipal corporation is not liable for damages to a person building on his premises, for injury by water, owing to the fact that the corporation had not drained its adjoining land, although such land be destined as an intended street. *Riopel & The Mayor &c. of Montreal*, M. Judgment confirming 17 September, 1880. Dorion, C. J., Monk, Ramsay, Cross, JJ. 3 Leg. News 320.

The corporation of the City of Montreal is liable for an accident caused by

the bad state of the foot-path of one of its streets. *Dme Grenier & The Mayor & al, of Montreal*, M. Judgment rever sing 15 September 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 296.

NOTE.—By this case it would seem that the case of O'Neil and Le Maire de Quebec is over-ruled. *v.* 16 L. C. R. 404.

The corporation of Montreal is liable in damages for closing a street, by which access to the property of the Plaintiff was rendered notably and in a special manner more difficult. *The Mayor & al, of Montreal & Drummond.* Taschereau, Ramsay, Sanborn, Mackay, Torrance, JJ. Mackay, Torrance. JJ., dis. Rep. 18 J. 225.

NOTE.—This judgment was reversed in the Privy Council, on the ground that the claim, if any existed, must be urged before the special tribunal of commissioners, appointed to value damages occasioned by expropriations. Their Lordships, however, incidentally expressed the opinion that the statutory power to close a street, not being made specially subject to damages, the corporation was not bound to indemnify the proprietor. In a later case, *Bell & The Corporation of Quebec*, the judicial committee explained, that they did not mean to say that if access to a property were cut off damages could not be recovered from a corporation having an unqualified power to do the act complained of. This court has not considered itself bound by these *dicta* of the Privy Council. On the question of jurisdiction the commissioners are not a tribunal, and therefore going before them is merely a form of procedure, which may be omitted expressly or impliedly by the parties. In addition to this, there is nothing better established in our law, than that the jurisdiction of the ordinary tribunals is not taken away by the mere fact of a special exceptional tribunal being appointed, unless the intention of the legislature to limit the ordinary jurisdiction is clearly expressed. The second point was not formally decided, and the case of *Bell & The Corporation of Quebec*, explanatory of the above case, relies on a distinction which has no foundation in our law. Depriving a party of the egress from and ingress to his property which he has hitherto enjoyed, is a very manifest expropriation; but there are others, such as making a street an *impasse*, close to a man's door. The opinion expressed in the case of *The Mayor of Montreal & Drummond*, did not really turn on any distinction between *enclave* and *impasse*, but on the general principle, that a person is not liable in damages for doing what the law permits him to do. On this point there has never been a question "*nemo damnum fecit, nisi qui id fecit, quod facere jus non habet nullus videtur.*"

The City of Montreal raised the level of a street within the city, so as to damage the property of the plaintiff. An action of damages was dismissed, under article 2261 C. C. (1) The Court of Appeal maintained the plaintiff's right of action in the ordinary courts, and that the damage complained of being continuous in its nature, and there being no special plea or evidence to show when such damage occurred or ceased, the two year's prescription was not applicable. *Grenier et al. & The City of Montreal.* M. Judgment reversing, 3 Feb., 1880. Sir A. A. Dorion, 25 J. 138. 3 Leg. News 51.

A municipal corporation has power to make a transaction. *Bachand & La Corporation de St. Théodore d'Acton.* M. Judgment reversing, September, 1874. Monk, Taschereau, Ramsay, Loranger, Beaudry, JJ. Dis. Monk & Beaudry, JJ.

La Cour Supériure a juridiction pour connaitre d'une poursuite, pour le recouvrement d'une somme excédant $200, ponr travaux faits pour une corporation municipale sur des chemins aux frais du propriétaire, et ce, nonobstant les articles 398, 401, 951 et 1042, C.

(1) The following actions are prescribed by two years.—2o. For damages resulting from offences and quasi-offences whenever other provisions do not apply.

M. *Ross & Corporation of St. Clotilde.* Q. Judgment confirming, 8 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11 Rev. Leg. 520.

A private company acting as a corporation will be enjoined, on a prosecution at the instance of the Attorney General, to discontinue its proceedings. And the constitution of the association, its having a board of directors with power to make by-laws, and having a corporate seal are indications of its acting as a corporation. *Dorion & The Attorney General.* M. Judgment confirming, 20 September, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Reported 4 Leg. News, 372.

A subscriber to the stock-list of a company in course of organization, and subsequently organized, is bound strictly by the conditions of the subscription list, and the company subsequently incorporated is not bound by the stipulations in a private letter granted to the subscriber by a promoter of the company who obtained the subscription, and who signed this letter as secretary *pro tempore* and director of the company. *Jones & Montreal Cotton Company.* M. Judgment confirming, 18 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Dunkin, JJ. Reported 24 J. 108. 1 Leg. News, 450.

The share-holders of a joint-stock company incorporated by letters patent, are those named in the letters patent, as also those who subscribe after the issue of the letters patent. Those who have subscribed the stock list before the emission of the letters patent, and who have not taken part as shareholders after the issue of the letters patent are not contributories as shareholders. *Rascony & The Union Navigation Company.* M. Judgment Reversing, 18 September, 1878. Sir. A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 24 J. 138, 1 Leg. News, 494.

Semble:—That a purchaser, *subsequently* to incorporation, of shares subscribed prior to incorporation, and who has paid a call after his purchase, is estopped from contesting the validity of the original subscription. *Macdougall et al. The Union Navigation Company.* M. Judgment confirming, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 63.

NOTE.—This question was raised on a *requête civile;* but the petition did not bring Appellants within the terms of art. 505 C. C. P. Strictly speaking therefore, the petition was not dismissed on the merits.

A joint-stock company sold off its whole stock and effects, and by resolution discharged its shareholders of the payment of the ten per cent still due on its stock. *Held,* that on *saisie-arrêt* a shareholder then in arrear might be condemned to pay the balance *so* due on his stock to a judgment creditor of the company. *Dancose & Richard,* Q. Judgment reversing, 5 September, 1876. Sir A. A. Dorion, C. J. Monk, Ramsay, Sanborn, Tessier, JJ.

Where a party, by error, subscribed for a larger number of shares that he intended to take, in the capital stock of an Insurance Company, and had sought ineffectually to be relieved therefrom immediately after, but took no legal steps to annull the contract until he was sued for calls to cover losses, and had in the meantime accepted a dividend of ten per cent on his shares, he will not be allowed to repudiate his subscription.

Consent given by error does not make the contract null. *Côté & Stadacona Insurance Co.* Q. Judgment confirming, 8 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk & Tessier, JJ., dis. 6 Q. L. R. 147, 10 Rev. Leg. 289.

NOTE.—In the Supreme Court this judgment was reversed, the Court holding that the taking of 10 per cent was not an acquiesence, as it was taken as interest on the amount the Appellant had paid in. 6 Rep. Supreme Court, 193.

The only difficulty to this theory is that it is unquestionable the Appellant

took it as a dividend on his shares as subscribed, and not as interest. To some extent the case was a hard one and the judgment of the Supreme Court was simply sentimental., *dolo facere, qui suo jure utitur.*" If it were not for certain decisions, one would be disposed to say that the principle was strangely misapplied in a case like this. The common law right and the statutory power stand on quite a different footing. The former is common to all men, the latter is a mere privilege, specially granted to a person, and it can hardly be presumed that it was the intention to benefit one man at the expense of another. It is possible that the use of the expression " the law" in English to express both *a law* and *the law*, may, to some extent, explain this extraordinary fallacy.

Action against a joint stock company to compel the company to transfer in their books shares belonging to Appellant. The action was dismised in the Court below for the following reasons:

" Considérant que les transports allégués avoir été consentis à la requérante, n'ont pas été acceptés par elle;

" Considérant qu'aux termes de l'article 1573 de notre Code Civil, le transport des actions dans les fonds des compagnies incorporées est réglé par les actes d'incorporation ou règlements de ces compagnies;

" Considérant qu'aux termes du règlement onzième de la Défenderesse, les parts dans la dite compagnie Défenderesse, ne peuvent être transportées que par écrit dans ses livres, signé par le cédant et le cessionnaire, ce dernier comme acceptant le transport;

" Considérant que vis-à-vis la société Défenderesse, la saisie du cessionnaire ne put résulter que de l'accomplissement des formalités prescrites par les réglements ou statuts d'icelle société quant au transport;

" Considérant qu'il est admis que les cédants n'ont pas d'autres actions dans la dite Compagnie Défenderesse et n'en avaient plus lorsque la Requérante s'est présentée pour accepter les dits transports, attendu que les dites actions avaient été transportées à d'autres, lesquels avaient accepté les dits transports." *Hart & vir & The Montreal Manufacturing Company.* M. Judgment confirming, 14 Dec., 1878, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ

A building Society incorporated under R. S. L. C. c. 69 may borrow, when authorized so to do by its By-Laws,—and it may make a promissory note in acknowledgment of such a liability,—and in absence of a special pleading denying the authority of the officers to make such note, and that it was given for value it will be presumed that the officers were authorized to make it, and that it was given for value. *La Société de Construction du Canada & La Banque Nationale.* M. Judgment confirming, 16 March 1880. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Caron JJ. 24 J. 226, 3 Leg. News 130.

A lease by a Telegraph Company of all its lines for 97 years, at a fixed annual rent, the lessees to have control of the rates for transmision of messages, etc., was held to be legal, their being a clause in the charter giving the company power to let, convey or otherwise part with their estate, real, personal or mixed. *The Montreal Telegrah Company & Low.* M. Judgment reversing, 19 Sep. 1883. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Baby, JJ. The Chief Justice and Ramsay J. dis. Rep. 6 Leg. News 327.

A railway company was authorized to issue a second quantity of debentures when 45 miles of their road was finished, and that then these new debentures would rank with those previously issued. The new debentures were issued before the road was finished and the holders of the first issue of debentures claiming on monies belonging to the railway company, contended that these second debentures were illegally issued. On the part of the Corporation of Quebec, holder of the second debentures, it was contended

that the forty-five miles were so nearly finished as to be a substantial fulfilment of the requirement, and that a Statute of the Province of Quebec had impliedly affirmed that the forty-five miles were finished.

Held in this Court, that a special power, the exercise of which was to diminish the rights of others, must be closely followed, and that where it was a thing to be done, before the power was exercised, it must be done effectually. Also that the proof of the preamble of a private bill did not go beyond the purposes of the act, and did not amount to a legislative declaration of the existence of a fact generally. *Corporation of the City of Quebec & The Quebec Central Railway Co.* Q. Judgment confirming, 8 Oct. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J. dis. In the Supreme Court this judgment was reversed.

A foreign corporation may be sued at any place in Lower Canada *where it has* an office for the transaction of business. So where a foreign corporation has an office for the sale of sleeping car tickets, at Montreal, the Company was rightly impleaded in an action for damages for unlawfully expelling the Plaintiff, holder of a sleeping car ticket issued by the company, from one of their sleeping cars, and thus compelling him to travel to Montreal without the accommodation to which he was entitled. *The New York Central Sleeping Car Co. & Donovan.* M. Judgment confirming, 27 May, 1882.

The fine which a corporation may be condemned to pay under Article 1025 C. C. P., should be ordered to be paid one half to the crown and one half to the petitioner. *The Montreal, Portland & Boston Railway Co. & Hatton.* M. Judgment modified, 24 March, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 351. 8 Leg. News 274.

A member of an incorporated Benevolent Association must have due notice given him before he can be expelled for non payment of dues.

A writ of *mandamus* will be ordered to issue to restore the expelled member subject to payment being made by him of arrears due to the Society. *Lapierre & L'Union St. Joseph,* M. Judgment reversing 21 December, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 21 J. 332, 1 Leg. News 39. Reversed in Supreme Court. 4 S. C. R. 164.

Members of a corporate body were expelled from the meeting rooms of the Society. They retired and met in another place, and organized themselves for objects similar to those of the association, taking a new name. The trustees were among this number. On an action by the old association calling on the trustees to a account, it was held, by the Court of Review that of the members who had taken a new name represented the old association, and that having accounted that association they were discharged. *Court Mount Royal, No.* 5694 *&c., & Boulton & al.,* M. Judgment confirming 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dissenting.

COSTS.—In French, costs, taken generally, are called *dépens de l'action. Frais* is sometimes used to express a particular item of costs, as *faux frais, "frais préjudiciaux."* (Ord. 1667, T. XII, art. 3, 1 Jousse 148) art. 29 C. C., which, however, would more properly have been called *dépens. Frais* is also used as a generic word to express all kinds of costs, as in article 1042 C P. C.

Costs were not given by the common law of either England or France, although known to the Roman law. The first English statute that gave costs was the statute of Glocester, 6 Edw. 1, (1267) 2 Inst. 279 and 288. In France, the Ord. of Charles VII in 1324, V. Denisart, vo. Depens. The curious will find a paragraph "*Peines des téméraires plaideurs sous Justinien*" in Bonjean, T. des actions, 2, 577. He gives a

reference to all the earlier texts on the subject.

Our law on the subject of costs arises principally out of the Ord. of 1667. It is in these words.

" Toute partie, soit principale ou intervenante, qui succombera même aux renvois, déclinatoires, évocations ou réglements de juges, sera condamnée aux dépens indéfiniment, nonobstant la proximité ou autres qualités des parties ; sans que sous prétexte d'équité partage d'avis, ou pour quelqu'autre cause que ce soit, elle en puisse être déchargée. Défendons à nos cours de parlement, grand conseil, cours des aides, et autres nos cours ; requêtes de notre hôtel et du palais, et à tous autres juges, de prononcer par hors de cours sans dépens. Voulons qu'ils soient taxés en vertu de notre présente ordonnance, au profit de celui qui aura obtenu définitivement, encore qu'ils n'eussent pas été adjugés, sans qu'ils puissent être modérés, liquidés ni réservés." Titre XXXI, art. 1.

This ordinance was published at Quebec, November 7, 1678, E. and C., vol. 1, p. 106. See also Jugements et délibérations du conseil souverain de la Nouvelle France, Tom. 2, p. 262. The remonstrance was as follows :

" Sur le dit titre, que parce qu'en ce pays il est difficile d'être bien conduit dans les affaires par de bons avis, ce qui cause souvent qu'on s'engage à plaider mal à propos, le conseil, sous le bon plaisir du roi, se réservera la faculté de prononcer sur les dépens avec mûre délibération, et selon l'exigence des cas, sans s'arrêter à présent à tout ce qui est dans le dit titre, qui regarde plus les procureurs et les avocats qui ne sont point établis dans ce pays, que les parties, lesquelles, par la diligence du conseil, ne souffrent point par la longueur des procédures ; que rarement on adjuge des dépens pour les voyages et séjours, et que le conseil continuera ce qu'il a pratiqué jusqu'à présent de ne faire tomber autant qu'il sera possible en taxe de dépens, que les expéditions des arrêts, significations d'iceux, commandements, sommations, saisies et exécutions ; et que les juges royaux et subalternes suivront l'article trente-trois du dit titre." Ed. and Ord., vol. 1, p. 200.

This *remontrance* virtually left the costs to the discretion of the court, and the law of Canada and that of England are therefore in this matter similar. *v.* CRIMINAL LAW.

Costs are in the discretion of the Court adjudicating, and unless given on an erroneous principle a condemnation to costs will not justify an appeal. ***Molson & Griffin.*** M. Judgment confirming, June 1874. Dorion C. J., Taschereau, Ramsay, Sanborn, Loranger JJ.

Where the Defendant is condemned to pay costs, the Court of Appeal will not interfere to qualify how the cost are to be taxed, and to say whether the Attorneys fees are included. ***McKenna et al. & Vandal.*** M. Judgment confirming, 21 February 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby JJ.

A judge of the Superior Court, may, in his discretion allow fees to counsel on an arbitration to fix the indemnity to be paid for lands taken by a railway company 43 and 44 Vic., c. 43, S. 9 par. 20 and 37. ***The Montreal & Sorel Railway Company & Vincent et al.*** M. Judgment confirming, 24 November 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

Where a defendant in an action of damages which has been dismissed with costs, causes an immoveable belonging to the Plaintiff to be taken in execution and sold by the Sheriff, he has a right to be collocated by privilege on the proceeds of sale for his costs of suit as well as for the costs subsequent to judgment. ***Tansey & Bethune et al.*** M. Judgment confirming, 25 January 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby JJ. Ramsay J. dissenting. Reported 8 Leg. News, 133. M. L. R. I. Q. B. 28.

A party successful in a suit was con-

demned to pay costs, and he appealed from so much of the judgment as condemned him to costs. The Court of Appeal will not readily touch a judgment for costs, or interfere with any special order as to costs, unless the order be evidently against principle and justice. *Crosbie & Blacklock.* M. Judgment, 27 January 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

A judgment allowing a pension *alimentaire* will be reformed but without costs, the point not being taken by the Defendant. *Kingborough & Pound.* Q. Judgment, 2 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 115. 4 Q. L. R. 11.

In an action of damages in the Superior Court for a large amount $400, and to reconstruct fences, judgment went in favour of Plaintiff for $50 and full costs of action. The Court of Review held this was an excessive adjudication as to costs, and reversed the judgment as to costs. The Court of Queen's Bench refused to interfere and the appeal was dismissed each party paying his own costs. *Les Sœurs de la Congrégation Notre-Dame & La Corporation de Ste-Cunégonde.* M. 15 June 1882. Sir A. A. Dorion, Baby JJ.

Where costs have been awarded on a false principle, the judgment will be reversed in appeal. So where Plaintiff goes to evidence on his whole case regardless of admissions made by Defendant, which admissions are not a confession of judgment within the terms of Art. 94 C. C. P., and only recovers what Defendant by his plea admitted to be due, the costs of the contestation should fall on Plaintiff, and if the Defendant be condemned to pay such costs the judgment will be reformed in appeal with costs. *Poulin et al. vs. Prévost.* M. Judgment. December 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Ramsay, J. dis.

A Defendant was foreclosed by default to answer *faits et articles* and moved to have the default taken off. This application was refused by the Court below and judgment given against the interrogatories being taken *pro. confessis.* He appealed; the judgment of the Superior Court was reversed as to the refusal to allow the Defendant to answer, and he was permitted to answer the interrogatories on payment of costs in the Superior Court *depuis et y compris l'inscription au mérite* and each party paying his own costs. *McGreevy & Gagné.* Judgment 4 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis. as to the question of costs in appeal. Appellant was right in the appeal.

When a party is condemned under the provisions of an Act which is *ultra vires*, goes to appeal, and during the appeal an Act is passed by the legislature having authority over the subject, which Act deprives the Appellant of his rights, he may be condemned to pay costs. *McClanaghan & St. Ann's Mutual Building Society.* Judgment. 4 February 1880. Dorion C. J., Monk, Ramsay, Cross, JJ. Ramsay, J., dis. as to question of costs. Appellant was right at the commencement of the action, and it is a violation of principle to condemn the party in the right to pay costs. *Expost facto* legislation does not merit special favour. Rep. 3 Leg. News, 61, 24 J. 162.

Action on a lost promissory note. The judgment went for Plaintiff in first instance for the amount with costs. In review the judgment was modified so as to deprive Plaintiff of his costs. He appealed. M. Judgment in review confirmed. *Bayard v. McMartin et al.* 14 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23, J. 211, 9 Rev. Leg. 689.

Where the Respondant validly desists from so much of the judgment in his favour as is erroneous the costs of all subsequent proceedings will be on the Appellant. *Chaloner & Poitras.* Q. Judgment, 5 June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 499.

Where a respondent has desisted from a judgment without tendering

costs, the appeal will be dismissed with costs of both Courts. *Belleau & Guay.* Q. Judgment, 1 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 4, Q. L. R. 91.

When an obligation mentions no place of payment, the debt is payable at the Defendants, and when the creditor sues, without demand, and the debtor, with his plea setting up absence of demand, tenders the amount due, the action will be maintained without costs. *Rodrigue & Grondin.* Judgment confirming, 6 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6, Rev. Leg. 643.

When a sum of money is payable on demand, with interest, and the Defendant pays into Court after return, when there is no previous demand, the Plaintiff will be condemned to pay costs. *Desrosiers & Rouillard.* M. Judgment confirming, 3 February, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Lorsqu'il n'y a pas d'endroit fixé par l'obligation, la demande de paiement doit être faite par le créancier au domicile du débiteur, (C C. art. 1152) sans que ce dernier soit tenu d'avertir le créancier quand il sera prêt à payer. *Beaudry & Barbeau.* M. Judgment confirming, 15 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 268.

In an action on a note *en brevet* payable on demand, cost will be given against Plaintiff if there be no previous demand, and if Defendant confesses judgment on the return of the action without contestation and brings the money into court it is not necessary for the debtor to prove he was ready to pay when the note fell due. *Dorion & Benoit,* M. Judgment confirming 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 171.

A promissory note was made payable at Plaintiff's house, but subsequently Plaintiff gave the note to his Attorney, and it was not in his hands to return it to Defendant, who, on suit, without any demand, paid the money into court with his plea. *Held* debtor was not liable for the costs of the action. *Lessard & Genest,* Q. Judgment confirming 8 Oct., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ.

Either party is entitled to demand *bornage,* and, in case of its being refused by the other party, the costs of the suit if succesful will be borne by the party refusing to be bound. *Libby & Wyman,* M. Judgment confirming March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Bélanger, JJ.

The Defendant who resists the *bornage* will be condemned to the costs of the action. *Grenier & al, & Giroux,* Q. Judgment confirming 6 Sep., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

Where the Defendant does not acquiesce in the demand for *bornage,* but pleads special matter to avoid *bornage,* he will be compelled in case of failure to substantiate his pretentions, to pay all the costs. *Burland & Macdonald.* Judgment confirming Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where the Defendant in an action of *bornage* contests the action unsuccessfully he will be condemned to pay the costs; but the costs of *bornage* will be borne equally by the parties. *Bouffard & Nadeau,* Q. Judgment confirming 5 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 321.

The costs of an uncontested *action en bornage* shoud be at the joint charge of the parties. *Loiselle & Paradis,* M. Judgment reversing 20 Feb., 1881. Sir A. A, Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 264.

Distraction of costs was awarded to the Appellant's Attorney by a judgment of the Circuit Court. This judgment was confirmed in Appeal with costs to the Appellant.

Held:—That to an execution by the Appellant, the Respondent could oppose in compensation a claim he had against the Appellant's Attorney to the extent of the costs in the Circuit Court, for which distraction of costs had been allowed, but not for those in appeal, which were awarded to the Appellant. *Logan & Kilgour*, M. Judgment reversing 21 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dis. Rep. 3 Dec. d'A. 336.

Where the Respondent has delayed the making of the transcript by any act of his, he will not be allowed costs of his motion to reject the appeal for want of a transcript. *Frigon & Parent*, M. Judgment March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

Appellant had appeared too late and moved to be allowed to file a regular appearance. Respondent also moved to have the irregular appearance rejected. Respondents motion was rejected without costs, and appellant was allowed to file a regular appearance on payment of the costs of his motion. *Bickle & Richard*, Q., 1 December, 1877.

Where there is an error of procedure in which both parties have participated the one ultimately successful will not be allowed the costs arising from his own neglect. So where, under the 36 Vic., c. 12, sects. 1 and 3, a party has not made any declaration to the effect that he did not abandon his right of appeal to this Court in case the judgment in Review should be unfavorable to him, the appeal will be dismissed on motion, but inasmuch as Respondent's motion was not made until after the factums were both filed, Respondent will not be allowed costs of his factum. *Doyon & Perron*, Q. Judgment 8 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where the successful party omits to move for costs in appeal until the term following that in which judgment was rendered, distraction will be granted, unless the party condemned to pay shows that the costs have been paid. *The Water Works Company of Three Rivers & Dostaler*, Q. Judgment 8 June, 1874. Monk, Taschereau, Sanborn, Ramsay, JJ. Rep. 18 J. 196.

Where it appears that the parties have agreed to a settlement in order to deprive the Attorney of one of them of his costs, the Court will condemn the party to whose favour the settlement seems to be made to pay costs. Thus where it seems a wife has been induced by her husband to discontinue a suit *en séparation de corps et de biens*, the husband will be condemned to pay costs. *Montrait & Williams*. M. Judgment confirming, December 17, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, dis. as to this motive. Rep. 3 Leg. News 10, 21 J. 144.

The Petitioner, Appellant to the Privy Council, prayed to be allowed to withdraw his deposit inasmuch as the appeal to the Privy Council had been dismissed without costs. The Petition was rejected on the ground that the deposit was security for the condemnation to costs as well those in the Court below as in the Privy Council. *Lemoine & Lionais*. M. Judgment, 22 June 1871. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Rep. 22 J. 23.

The non-payment of costs on an incidental proceeding in a suit cannot entitle the party to whom the costs are due to a stay of proceedings until the costs are paid. *Cutting & Jordan*. M. Judgment confirming, 13 Feb. 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Bélanger JJ. Rep. 19 J. 139.

An action on a promissory note withdrawn subject to costs. New action on same note, transferred to another, without costs, plea of litispendence. *Held* plea bad. *Martin & St-Pierre*. Q. Judgment reversing, 7 Oct. 1882. Sir A. A. Dorion C. J., Ramsay, Tessier, Cross, Baby JJ.

CRIB BITING. *v.* VICE REDHIBITOIRE.

CRIMINAL LAW.

§ 1. Abduction.
§ 2. Amendment.
§ 3. Arrest of judgment.
§ 4. Assault.
§ 5. Bail.
§ 6. Banking Act.
§ 7. Battery.
§ 8. Certiorari.
§ 9. Confession.
§ 10. Conspiracy.
§ 11. Conviction.
§ 12. Coroner's inquest.
§ 13. Enquete.
§ 14. Evidence.
§ 15. Extradition.
§ 16. Fraudulent appropriations.
§ 17. Habeas corpus.
§ 18. Indictment.
§ 19. Jury.
§ 20. Larceny.
§ 21. Libel.
§ 22. License act.
§ 23. Manslaughter.
§ 24. Mistrial.
§ 25. Motion to quash.
§ 26. Murder.
§ 27. Necessary food, &c.
§ 28. New trial.
§ 29. Perjury.
§ 30. Rape.
§ 31. Reserved case.
§ 32. Speedy trial act.
§ 33. Trial.
§ 34. Vagrancy.
§ 35. Venue.
§ 36. Verdict.
§ 37. Writ of error.

§ 1. *Abduction.*—On an indictment for abducting a girl under the age of 16, where it appeared that the girl had left her guardian's house for a particular purpose with his sanction, that she did not cease to be in his possession, within the meaning of the Statute 32 and 33 Vict., cap. 20, sec. 56. *The Queen & Mondelet,* M. Judgment 19 April, 1877. Ramsay, J. Rep. 21 J. 154.

§ 2. *Amendment v.* Indictment.

§ 3. *Arrest of Judgment v.* Reserved case.

§ 4. *Assault v.* No. 7.—*v.* Evidence No. 14.

§ 5 *Bail.*—The Court will not bail a prisoner accused of shooting with intent to murder, if the evidence be positive and strong against the prisoner. *Ex-parte Cheevers.* Q. Judgment, June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

When the offence charged is a felony, such as shooting with intent to murder, and the testimony against the prisoner is positive, bail will be refused. *Exp. Michael Cheevers.* Quebec, June 1880.

§ 6. *Banking Act.*—In an indictment of a cashier under sec. 62 of the Banking Act of 1871, for having unlawfully and willfully made a willfully false and deceptive statement in a return respecting the affairs of the bank, it is not necessary to allege that the return referred to was one required by law to be made by the accused, or that any use was made by him of such return, or to specify in what particulars the return was false.

The enumeration in the indictment of several alleged false statements constitutes but one count, and a general verdict is sufficient if the statement be shown to be false in any one of the particulars alleged.

It is not necessary to allege in the indictment that the false statement was made with intent to deceive or mislead. *The Queen vs. Cottè* M. Judgment, 19 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 22 J. 141.

The Banking Act of 1871 required monthly statements of the affairs of Banks to be made to the government, signed by the president or other officer, and the form of return prescribed certain headings under which the liabilities and assets should be classed. The defendant, a bank president, was indicted for making a wilfully false and deceptive return, the falsity of the return consisting in the improper classification of the assets and liabilities.

First, large sums borrowed by the defendant's bank from other banks, and for which deposits receipts were given, were classed as "other deposits payable after notice or on a fixed day;" secondly, demand notes were classed as "bills and notes discounted and current;" and, thirdly, over-drafts were also classed as "notes and bills discounted and current."

Held:—1o. The question as to whether the items firstly and secondly mentioned had been improperly classified was a question of fact for the jury and not one of law for the Court.

2o. As to the item thirdly mentioned, as matter of law, an over-draft is not current, and the classification of over-drafts under the heading of "notes and bills discounted and current" was properly held by the presiding judge to be illegal.

3o. The instruction to the jury, that wilful intent to make a false return may be inferred by the jury from all the circumstances of the case proved to their satisfaction, was correct.

4o. When no application has been made for a new trial, and the question whether a new trial should be granted has not been reserved, the Court sitting in appeal and error will not make an order for a new trial, when the conviction is quashed. *Reg. vs. Hincks.* M. Judgment, 20 December, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 116.

§ 7. *Battery v.* EVIDENCE No. 14.

§ 8. *Certiorari v.* CORONER'S INQUEST. HABEAS CORPUS.

An order having been granted, under 32 & 33 Vict., c. 29, s. 11 (1869), changing the place of trial from Quebec to Montreal, and ordering that the inquest and all the proceedings had before a coroner should be transmitted to the Court of Queen's Bench at Montreal, and such order for transmission of inquest having been obeyed; a writ of *certiorari* to produce the return of proceedings before a judge of the Court of Q. B. in Chambers, in order that the inquest may be quashed for illegality, is unnecessary, and a petition presented in Chambers, praying for the issue of such writ of *certiorari*, will not be granted. *The Queen & Brydges.* M. Judgment in chambers, 11 March, 1874. Ramsay, J. Rep. 18 J. 94.

§ 9. *Confession v.* EVIDENCE.

§ 10. *Conspiracy v.* EVIDENCE, INDICTMENT.

§ 11: *Conviction.*—When a conviction includes costs for the arrest, commitment and conveyance of a party to gaol, and the statute prescribes that no other costs shall be charged by any attorney, officer, constable or any other officer of justice than those mentioned in schedule 4, and there is no schedule 4, the prisoner will be discharged. Exp. *Archambault.* M. Judgment discharging prisoner in chambers, 9 Feb., 1880. Ramsay, J. 5 Leg. News 50, 10 Rev. Leg. 211.

The License Act of Quebec (1878), sect. 71 establishes a special penalty for certain infractions of the law in territory "municipally organized." It being a public Act by a proclamation, issued under the authority of a public Act, that the territory named is municipally organized, the correct name of the territory is sufficient, without any substantive allegation that the territory is municipally organized. Exp. *Archambault.* M Judgment in chambers, 9 Feb., 1880. Ramsay, J. Rep. 10 Rev. Leg. 211, 3 Leg News, 50.

The Court will not presume that Sault St. Louis was a "land set apart or reserved for Indians," unless it be set forth in the complaint, and so where a party was convicted before the Police Magistrate for having: "within the space of six months from the time that the offence herein mentioned was committed to wit, on the 9th day of Sep., in the year aforesaid at Sault St-Louis aforesaid in the district aforesaid in the Prov. of Quebec, and Dominion of Canada, unlawfully and knowingly kept a house

wherein intoxicating liquor to wit; whiskey, was sold contrary to the Statute &c.," the prisoner was discharged. Exp, *Assonkalisson*. M. Judgment. Q. B. Cr. side, discharging prisoner, Oct., 1876.

Under the licence amendment act of 1874, 37 Vict. c. 3 sect. II.—Actions or prosecutions for offences commited against the licence law, may be brought by any private individual, and a conviction at the suit of A. B., deputy revenue officer, is good, as the prosecution was by and in the name of a private individual.

It is not necessary by the conviction to condemn the defendant to pay the costs of the warrant of commitment, nor those for conveying defendant to gaol, as this is ordered by Consolidated Statutes of Canada, c. 103, ss. 62 and 69. *Exparte Ockslayer*. Judgment, 7 Dec., 1880. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'Ap. 99.

If the statute under which a person is convicted distributes the fine in positive terms, it is not necessary that the commitment should take notice of the conviction, nor need it say to whom costs are payable. *Exp. Assonkalisson*. M. Judgment, Oct. 1876.

The charge was that petitioner being " a loose idle and disorderly person" for that the said R. W. on the 6th day of June instant, at the said city of Montreal did indecently expose his person, to wit, his private parts in a vacant lot of ground adjoining St. Denis street in the said city, so as to be seen from the said street. It was contended that the exposure must be in a street, road' public place or highway. The French version is very clear; the words are *y expose*. The English version is not clear. The Court adopted the version most favorable to the prisoner. The conviction was quashed. *Exp. Walter*. M. Judgment quashing conviction.

The conviction is that petitioner being a vagrant, loose, idle and disorderly person, within the meaning of the statute, &c., for that the said P. S. on the 11th day of Sep. inst., at the said city, did cause a disturbance in Hypolite street, in the said city, by cursing and swearing, and by using insulting language, being then and there drunk, &c.

Where a person is condemned by a magistrate acting under the 32 and 33 Vic., c. 32, ss. 2, 3, for an aggravated assault, to pay a fine of $100 and to six month imprisonment *with hard labour*, there is excess of jurisdiction, inasmuch as the statute only authorizes the double penalty of fine and imprisonment, which does not include hard labour; and the prisoner was discharged on *habeas corpus*. *Exparte Burns*. Q. Judgment, 6 Dec., 1873. Badgley, Monk, Taschereau, Ramsay, JJ.

A Statute (32 and 33 Vic., c. 28) empowered a magistrate to sentence a person convicted to imprisonment with or without hard labour for two months, or by a fine not exceeding $85. or by both such fine and imprisonment. By an amending Act (37 Vic., c. 43) it is provided that " the term for which any offender may be sentenced to imprisonment under the Act of 1869, is hereby extended to six months." The magistrate sentenced petitioner to the fine of $50 and to imprisonment for six months, with hard labour. The majority of the Court interpreted the amending Act to mean that the imprisonment there mentioned was that of the previous Act, and that it was only the term that was extended.

The 32 and 33 Vic., c. 32, s. 17, empowers the magistrate to imprison any one convicted of keeping a disorderly house " with or without hard labour for any period not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case $100, or to both fine and imprisonment not exceeding the said period and sum." The magistrate sentenced the petitioner to the full amount of $100 and to imprisonment " *with hard labour*. The court distinguished the case from that of Exp. Williams as in this case the variation was not depending upon an amendment, and it could

not be presumed here that the legislature meant at the same moment to express that imprisonment meant either imprisonment with hard labour, or without it. *Exp. Somers*, M. Judgment Q. B., Cr. side, quashing conviction. Ramsay, J.

§ 12. *Coroner's inquest.*—An improper finding of a Coroner's inquest may be quashed on a rule.

A Coroner's inquisition is identical with an indictment, and the omission of the words "feloniously" and "slay" in an inquisition of manslaughter is fatal.

The managing director of a Railway Company is not liable to indictment for manslaughter by reason of the omission to do something which the company was not bound to do by its charter, though he had personally promised to do it. *Exp. Brydges*, M. Judgment Q. B., Cr. side, 9 Ap. 1874. Ramsay, Sanborn, JJ. Rep. 18 J. 141.

§ 13. *Enquete v.* PERJURY, No. 29.

Witnesses failed to appear to depose in a criminal prosecution against the prisoner. They were not to be found in the country and the father and mother of the witnesses deposed that the witnesses did not wish to appear and that they had received a telegram saying they were in New York.

Held, that absence was what it was necessary to establish, under 31 and 32 Vic., cap. 30, sec. 30, and that this could be proved by evidence that the parties were not present, and could not be found at their domicil or usual place of abode. The testimony of the High Constable, uncontradicted, established the absence, and the deposition of the absent witnesses might be read. *Reg. v. Beriau*, M. 10 May, 1878. Ramsay, J.

The prisoner was tried for rape, and in cross-examination the complainant was asked questions tending to elicit the fact that she previously had connection with other men. The Court refused to allow the questions to be

put, but reserved the point. *Reg. v. Laliberté*, Q. Judgment maintaining the ruling 5 Dec., 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay, J., dis. (1)

Evidence of a general deficiency in the books of a clerk, alone, will not support an indictment for larceny. *The Queen & Glass*, M. Judgment quashing conviction June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

But a clerk in a bank may be convicted of embezzlement, on proof of a general deficiency supported by evidence of unlawful appropriation, though no precise sum paid by any particular person is proved to have been taken. *The Queen v. Glass*, M. 22 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dis. Rep. 1 Leg. News 41.

An indictment for manslaughter may be maintained on evidence of an assault where there is no battery. *Reg. v. Dugal*, Q. Judgment 5 Dec., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Dorion, C. J. Cross, J., dis. Rep. 4 Q. L. R. 350.

On a trial for perjury evidence of a conspiracy by extra-judicial confession by prisoner's sister is illegal, and where such evidence is admitted, and the prisoner is convicted, the verdict will be held bad. *Reg. v. Guay*, Q. Judgment 7 September, 1874. Dorion, C. J., Taschereau, Ramsay, Sanborn, JJ. Rep. 18 J. 306.

§ 15. *Extradition v.* EXTRADITION.

§ 16. *Fraudulent appropriation.* — The "power of attorney" 32 and 33 Vic., cap. 21, must be a *written* power, and evidence of a verbal power will not bring the accused within the scope of the act. *Reg. & Chouinard*, Q. Judgment 8 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Reported 4 Q. L. R. 220.

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(1) NOTE.—In the Supreme Court this judgment was reversed and the prisoner discharged. 1 S. C. Rep. 117.

§ 17. *Habeas corpus.*—When a writ of *habeas corpus* has been refused by the Court of Queen's Bench in term, and no valid grounds being set up by the petitioner for his discharge, he is not precluded from presenting a new petition. *Exp. Williams.* M. Judgment, 18 March, 1875.

A writ of *habeas corpus*, on good cause shown, may be granted the prisoner moving to be allowed to proceed *in forma pauperis. Exparte Louise Gournote.* M. Judgment, 11 Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 336.

A writ of *habeas corpus* will be refused if applied for so late in the term that it could not be disposed of in the term. *Exparte Franklin.* C. S. L. C., c. 95, s. 9, 31 Car. II c. 2, s. 18. Dec., 1875. Dorion, C. J., Monk, Taschereau, Ramsay. Sanborn, JJ.

An affidavit in support of an application for a writ of *habeas corpus* stating that in so far as deponent knows the facts they are true is valueless. And if on the return to a writ of *habeas corpus* it appears that the party having the custody of the person for whom the petition was presented, is the person to whom the writ is addressed, the return will be considered insufficient. *Exp. McCarthy.* M. Judgment, 26 Feb., 1875. In chambers. Ramsay, J.

On a petition for *habeas corpus* complaining of an illegal commitment, there should be a copy of the commitment, or an affidavit that it was applied for and refused. *Exp. Pollock.* M. Judgment, November, 1881. Sir A. A. Dorion, C. J., Tessier, Cross, Baby, JJ.

A writ of *habeas corpus* being granted, the Court of Queen's Bench will not order a *certiorari* to issue to bring up the record before the justice to see whether the evidence is sufficient to commit. *Exp. Narbonne.* 22 December, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dis. Rep. 3 Leg. News 14. 25 J. 330, 10 Rev. Leg. 63.

A district magistrate acting under the speedy trial act, acts as a court of record for all the purposes of the trial, and the proceedings connected therewith or relating thereto, although he does not retain the record, but files it in the court of general sessions, really before this court in the rural districts. Being a court of record his judgment cannot be enquired of on *habeas corpus.* It may on writ of error which the Court of Queen's Bench has, by Statute, authority to grant, as also it has, as an incident of its general powers, the right to issue a *certiorari* to bring up the record. *Exp. O'Kane,* M. Judgment quashing writ of *habeas. corpus.* Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The judgment of a Superior Court of law will not be interfered with on the return to a writ of *habeas corpus*, and so a writ of *habeas corpus* in order to discharge prisoner from custody, on the ground that the prisoner was sentenced to a punishment not authorized by law, will be refused by the Court of Q. B. *Ex parte McGrath.* Judgment Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a prisoner has been condemned to a punishment greater than the law allows by a magistrate or other inferior tribunal, he will be discharged on *habeas corpus. Ex parte Burns,* Q. Judgment 6 Dec., 1873. Badgley, Monk, Taschereau, Ramsay, JJ. *v.* CONVICTION.

§ 18. *Indictment.* — An indictment not signed by the Attorney General for the Province of Quebec, but by the clerk of the crown, and found by the grand jury with the foreman's endorsement, is sufficiently authenticated. *Regina & Regnier,* M. Judgment on reserved case.

An indictment may be in the French language and the words "*les jurés de notre Souveraine Dame la Reine déclarent,*" is equivalent to "The jurors for Our Sovereign Lady the Queen PRESENT." *The Queen & Chouinard,* Q. Judgment 8 Sep., 1874. Dorion, C. J.,

Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 4 Q. L. R. 220.

Where an indictment for wounding with intent averred, in the first count, *with intent feloniously, willfully, and of his malice aforethought the said A. B. to kill and murder*, and in the second count, *with intent to commit murder*,—the second count materially differed from the first.

The crime charged in the second count viz., wounding *with intent to commit murder*, was thus described in the words of section 10 of 32-33 Vict., chap. 20.

By said section 10 that crime was made different in nature from what it was at common law, and a severe penalty was attached to it.

No objection having been taken to the (second) count until after verdict, the count was sufficient.

It was not necessary to aver in the indictment in what manner the defendant had wounded the prosecutor. *The Queen & Deery*, M. Judgment on a reserved case 18 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Monk, Ramsay, JJ., dis. Rep. 26 J. 129.

The words "feloniously and of his malice aforethought" were omitted in the averment of the intent, in a count of an indictment for wounding with intent to murder. *Held*, that the count was insufficient and that the offence was not described in the words of the Statute. *The Queen & Bulmer*, M. Judgment quashing conviction 18 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Reported 5 Leg. News 387.

The defendant was indicted under section 25, 32 and 33 Vict., cap. 20, for that he, "on the 7th day of April, 1879, at the City of Montreal, etc., then being the husband of one Bridget Doyle, his wife, and then being legally liable to provide for the said Bridget Doyle as his wife as aforesaid necessary food and clothing and lodging, unlawfully, wilfully and without lawful excuse did neglect and refuse to provide the same, against the form &c." The judge of sessions reserved the two following questions: 1st. Whether the capacity of providing on the part of the defendant should have been alleged. 2nd. Whether the neglect or refusal to provide for his wife, should have been alleged to be of a nature to endanger her life, or to permanently injure her health. *Held*, that the indictment being in the words of the Statute was sufficient. *The Queen & Smith*, M. Judgment 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The Defendant was indicted under section 25, 32 and 33 Vict., cap. 20, for that she on the 5th day of January, 1879, then being the mistress of a certain girl called Marie, her servant, her maiden name being unknown, of the age of eight years, did unlawfully, and maliciously do grevious bodily harm to the said Marie, whereby the health of the said Marie was permanently injured. At the trial it was proved that the child's name was Marie Vincent, and that she was not the servant of the defendant. In face of this evidence, the offence, as laid, could not be proved, and motion to amend being made the learned Chief Justice ordered the indictment to be amended by striking out the words "then being mistress of" and "her servant, her maiden name being unknown," and by adding after the name "Marie" the name of Vincent in the three places where the name "Marie" occurs. The trial proceeded on the indictment so amended, and the prisoner was found guilty of a common assault. The prisoner was sentenced to three months imprisonment, but in passing sentence the learned Chief Justice reserved two questions: First, whether the amendment was justifiable; second, whether the verdict for assault ought to be maintained. The Court held the conviction to be right. *The Queen vs. Bissonnette*. M. Judgment confirming, 20 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Sect. 8 of the perjury Act (32 & 33 Vic., c. 23) enacts that "any person accused of perjury may be tried, convicted and punished in any district, county or place where he is apprehended or is in custody." L. was indicted in the District of Beauharnois for perjury committed in the District of Montreal; there was no averment in the indictment that the defendant had been apprehended or in custody, or that he was in custody at the time of the finding of the indictment. The defendant neither demurred nor moved to quash, but after verdict moved in arrest of judgment on the ground that there was no averment in the indictment of his having been apprehended or in custody. The sitting judge dismissed the motion in arrest of judgment, but reserved the point so raised.

Held:—That the indictment was defective, that the defect was one which could not be amended and, consequently, was not cured by verdict, and that the judgment be arrested and the defendant discharged. *The Queen & Lynch.* M. Judgment on reserved case arresting judgment on verdict, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 22, J. 187, 7 Rev. Leg. 553.

On a motion to quash an indictment for perjury (1) that there were no words to show the jurisdiction of the court as in the Lynch case (22 J. 187, 7 Rev. Leg. 553), (2) that there were two distinct charges of perjury in the indictment, (3) that the word "knowingly" is omitted, (4) that it does not appear that the perjury was in any judicial proceeding.

Held: the venue is Montreal, and the perjury is alleged to have taken place there, therefore Lynch's case dont apply. Including two charges of perjury in the same indictment would not be ground for quashing the indictment; but as a matter of fact the two false statements were in the same deposition, and under one oath; therefore there were not two faise oaths but one. As regards the word "knowingly," the indictment follows the statutory

form and it is therefore declared by law to be sufficient. On the last ground the terms of the statute are sufficiently followed. *The Queen v. Bain*, M. Judgment rejecting motion, 16 Ap. 1877. Q. B., Cr. side, Ramsay, J.

NOTE a similar judgment was rendered the same day in the case of *The Queen & Bownes.*

On motion to quash an indictment, *held:* That putting words in brackets does not vitiate an indictment, if without such words the indictment would be sufficient. That the prisoner may be indicted as clerk, although it be admitted he was a cashier. It is a question for the jury whether, in fact, the prisoner was a clerk, by whatever name he was designated, and the court will not presume that a person styled "cashier" cannot be a clerk.

In an indictment for larceny, it is not necessary to state the particular coin or note alleged to have been stolen.

An indictment for the taking and applying to his own use certain property of the Hochelaga Bank, to wit "75 shares of the stock of the Montreal Telegraph Company" is sufficient; as there is nothing in the law to declare that a bank may not have a proprietary interest in such shares. *The Queen & Paquet*, M. Judgment Q. B., Cr. side, 22 April, 1879. Ramsay, J. Rep. 2 Leg. News 140.

An indictment for conspiracy setting forth that the defendants "being evil-disposed persons and wickedly devising and intending to obstruct and prevent the mayor and municipal councillors of the municipality of the said parish of St Constant from exercising their municipal functions, and fulfilling their municipal duties, on the 7th day of December, 1874, did, amongst themselves and with other persons to the jurors unknown, conspire, combine, confederate and agree together." The indictment then set up some overt acts, omitting the word "unlawful" to qualify the acts, and concluded thus:

"the whole for the illegal and oppressive purpose of forcing upon the said Mayor and Councillors a Secretary-Treasurer, whom they had dismissed from office." The majority of the court held this indictment sufficient, on writ of error. *Defoy & The Queen*, M. Judgment 21 June, 1877. Monk, Ramsay, Tessier, Sicotte, Bélanger, JJ. Monk, Ramsay, JJ., dis. Were of opinion that "unlawful" was not a necessary word in the body of an indictment for misdemeanour and that the overt-act of a conspiracy was not necessarily unlawful; but that the indictment was bad owing to there being no definite allegation as to the object of the conspiracy.

On motion to quash the indictment it will be amended to avoid possible difficulty, by adding the words, "a body corporate" after the name of a corporation created by a public statute, although it seems to be unnecessary. *The Queen & Paquet*, M. Judgment Q.B., Cr. side, 22 April, 1878. Ramsay, J. Rep. 2 Leg. News 140. r. BANKING ACT No. 6.

§ 19. *Jury.*—Where the jury sworn to try an indictment for forgery, a felony by statute, is allowed to go at large, the trial will be held to be null. *The Queen & Denick.* Judgment June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 214.

On a trial for forgery the panel of petit jurors returned by the sheriff, contained the names of Robert Grant and Robert Crane. The name of Robert Grant was called from the panel as one of the jury, and Robert Grant, as was supposed, went into the box, and was duly sworn as Robert Grant without challenge. The prisoner was convicted. Before the jury left the box, it was discovered that Robert Crane had by mistake answered to the name of Robert Grant, and that Robert Crane was really the person who served on the jury. *Held*, that the conviction is bad, the prisoner not having had an opportunity to challenge Robert Crane. *The Queen v. Feore*, Q. Judgment on reserved case setting verdict aside 8 June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn. Tessier, JJ. Rep. 3 Q. L. R. 219.

The record showed that on the trial of the indictment the judge discharged the jury after they were sworn, in consequence of the disappearance of a witness for the Crown, and the prisoner was remanded. On a writ of error, *held*, that the judge had a discretion to discharge the jury, which a Court of error could not review; that the discharge of the jury without a verdict was not equivalent to an acquittal; and that the prisoner might be put on trial again. *Jones & The Queen.* M. 17 Sep., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 309, 1 Dec. d'A., 100.

Where to obtain six jurors speaking the language of the defence (English) the list of persons speaking that language was called, and several ordered by the Crown to stand aside; and the six English jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of them previously ordered to stand aside was again called, *held*, that the previous "stand aside" stood good, and needed not be withdrawn till the panel was exausted. *Regina vs. Dougall et al.* M. Judgment, 22 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 18 J. 242.

The right of the Crown to tell jurors to "stand aside" exists for misdemeanours as well as for felonies. *The Queen vs. Dougall et al.* M. Judgment. Q. B., Cr. side, 11 Ap. 1874. Ramsay, J. Rep. 18 J. 85.

§ 20 *Larceny.*—An unstamped promise to pay is a valuable security, and, in the hands of the maker, is such property as to be the subject of larceny. *Reg. vs. Scott.* Judgment, 22 June, 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Dorion, C. J., & Sanborn, J. dis. Rep. 21 J. 225. S. was indicted, tried and convicted for stealing a note for the payment and value of $258,33, the property of A. McC and another. The evidence showed that the promis-

sory note in question was drawn by A. McC. and C. R., and made payable to Scott's order. The said note was given by mistake to S., it being supposed that the sum of $258.33 was due him by the drawer, instead of a less sum of $175. The mistake being immediately discovered, S. gave back the note to the drawers, *unstamped* and *unindorsed*, in exchange for another note of 175. An opportunity occuring, S. afterwards. on the same day, stole the note; he caused it to be stamped, indorsed it, and tried to collect it.

Held: On appeal reversing the judgment of the Court of Queen's Bench, that S. was not guilty of larceny of "a note" or of "a valuable security" within the meaning of the Statute, and that the offence of which he was guilty was not correctly described in the indictment. 2 S. C. Rep. 349.

Evidence of a general deficiency will not alone support an indictment for larceny or embezzlement. There must be some proof of a taking, that is that certain money went into the hands of the prisoner. *Queen & Glass.* M. Judgment, June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. But a clerk in a bank may be convicted of embezzlement, on proof of a general deficiency supported by evidence of unlawful appropriation, though no precise sum paid by any particular person is proved to have been taken. *Queen & Glass.* M. Judgment, 22 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J. dis. Rep. 1 Leg News 41.

§ 20. *Larceny v.* EVIDENCE.

§ 21. *Libel.*—On a trial on an indictment for libel, the defendant cannot plead or prove the truth of the libel.

The English Act of 1792, 32 Geo. III, c. 60, is in force in Canada, and consequently it is for the jury to say whether under the facts proved there is libel, and whether the defendant published it.

On a trial for libel, acts of the defendant immediately after the publication may be proved, in order to show that there was no malice.

The existence of rumours cannot be proved in justification of the libel. *The Queen v. Dougall & al.*, M. Q. B., Cr. side. Judgment, 11 Ap., 1874. Ramsay. J., 18 J. 85.

§ 21.—*License Act v.* CONVICTION.

If a person gives another drink, with the intention to do him an injury and he dies, it will be manslaughter; and if the intention be to kill him, it will be murder. *The Queen & Boutet*, Q. Charge to the jury Q. B., Cr. side, Oct., 1883. Ramsay, J.

§ 23. *Manslaughter v.* EVIDENCE.

§ 24. *Mistrial v.* JURY.

§ 25. *Motion to quash v.* INDICTMENT.

§ 26. *Murder v.* MANSLAUGHTER.

§ 27. *Necessary food.*—In an indictment under 32 and 33 Victoria, c. 20, s. 25, it is not necessary to allege that by the refusal and neglect of the defendant to supply the necessary food, etc., to his wife, her life had been endangered or her health permanently injured; nor is it necessary to make proof to that effect. *The Queen & Scott*, M. Judgment confirming 24 September, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 7 Leg. News 322.

§ 28. *New trial.*—A judge sitting alone on the crown side will not grant a new trial in a criminal case. *The Queen v. Dougall & others*, M. Judgment Q. B., Cr. side, 28 Sep., 1874. Ramsay, J. Rep. 7 Rev. Leg. 578.

§ 29. *Perjury v.* EVIDENCE.—The prisoner was indicted for perjury in a deposition in a civil suit. He was sworn before the judge, who took notes of the evidence, on the 25 April, 1873. The case was then continued to the first *enquête* day, but not proceeded with, till the 25 April, 1874, a day in term,

when the deposition was continued *at length*, and owned and acknowledged before the prothonotary. The alleged perjury was in the last part of the deposition. The objection taken was, that this was only a voluntary statement. The objection was held to be well taken, and the conviction was quashed. *The Queen v. Gibson*, M. Judgment quashing conviction 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 7 Rev. Leg. 573.

Where the *enquête* is taken under art. 284 C. C. P., there must be a consent in writing to render the proceeding regular, and a deposition taken when there is no such consent is only a voluntary statement on which perjury cannot be assigned. *The Queen v. Martin*, M. Judgment 10 May, 1876. Q. B., Cr. side, Ramsay, J. Rep. 21 J. 156, 7 Rev. Leg. 672.

§ 30. *Rape v.* EVIDENCE.

§ 31. *Reserved cases.*—The general sessions of the peace may reserve a case for the consideration of the Court of Appeal and Error. *The Queen v. Smith*, M. Judgment 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 223.

The defendant who has not been bailed should be present at the hearing and judgment of the case reserved. *The Queen & Deery*, M. Judgment on reserved case 18 Dec., 1874. Dorion, C. J., Monk Taschereau, Ramsay, Sanborn, JJ. Rep. 26 J. 129.

In a later case it was held, that on the hearing of a reserved case it is not necessary that the prisoner should be present, and he may be kept locked up in gaol to prevent his being present while his case is being argued. *The Queen v. Glass. The Queen v. Scott*, M. Judgment 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, Ramsay, JJ., dis. Rep. 21 J. 245, 1 Leg. News 212.

A question raised by motion in arrest of judgment is a question arising on the trial, and properly reserved. *The Queen*

v. Deery, M. Judgment on reserved case 18 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 26 J. 129.

"Trial," within the meaning of C. S. L. C., c. 77, s. 57, is not terminated until sentence is rendered, and a "question which has arisen on the trial" does not necessarily mean a question that was raised at the trial, but one that took its rise at the trial; and therefore a point not mentioned by the defence may be reserved by the Court. *Reg. v. Bain*, M. Judgment 22 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 23 J. 327.

Where a case reserved mentioned a motion in arrest of judgment, and set forth the text of the reasons in support thereof, and reserved only the reasons, the Court, on the appeal side, would reject the motion, if it ought not to be maintained for any of the reason therein contained, the jurisdiction of the Court for crown cases reserved being strictly limited to the point reserved. *The Queen & Deery*, M. Judgment on reserved case 18 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 26 J. 129.

The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the defendant is alleged to have given false testimony, is not material, where the assignment of perjury has no reference to the pleadings; but the defendant, if he wishes, may in case the plea be not produced, prove its contents by secondary evidence.

It is not essential to prove that the facts sworn to by the defendant, as alleged in the indictment, were material to the issue in the cause in which the defendant was examined.

A reserved case may be amended at the request of the defendant, during the argument thereon before the full Court, by adding the evidence taken at the trial.

(Following *Reg. & Bain*. 23 L. C. J.

327). A new trial may be ordered on a reserved case, in misdemeanours, where it appears to the Court on the evidence that an injustice may have been done to the defendant. *The Queen & John Ross*, M. Judgment reversing 27 September, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported M. L. R. 1 Q. B. 227.

§ 32. *Speedy trial Act v.* EVIDENCE.

§ 33. *Trial v.* JURY, RESERVED CASE. —An application to postpone a trial, in consequence of the absence of material witnesses, must be supported by special affidavit showing that the witnesses are material. *The Queen v. Dougall & al.*, M. Judgment Q. B., Cr. side, 11 Ap. 1874. Ramsay, J. Rep. 18 J. 85.

§ 34. *Vagrant v.* CONVICTION.

§ 35. *Venue v.* INDICTMENT.—The Statute 32 and 33 Vic., cap. 29, sect. 11, enacts that "whenever it appears to the satisfaction of a judge that it is expedient to the ends of justice that the trial of any person charged with any felony or misdemeanor should be held in some place other than that in which the offence is supposed to have been committed, or would otherwise be triable, may order that the trial shall be proceeded with in some other district or place. The power is purely discretionary, and should be used with great caution, but where the application is made on the part of the accused, it will be sufficient to justify such discretion, that persons might be called on the jury whose opinions might be tainted with prejudice, and whom the prisoner could not challenge *The Queen v. Russell*, M. Judgment granting order for change of venue. Sep., 1878.

On an application for change of venue from the district of Three Rivers, the court would not decide the merits of the application, without deciding that the court had or had not jurisdiction. No reason had been given to establish that there was any reason why the judge or court at Three Rivers should not take cognizance of the matter, and it would not be a proper exercise of the discretion of this court to grant the order required, without something to establish this. The case of Mr. Brydges furnishes no precedent for the present application. Mr. Brydges was arrested in Montreal, on a Sunday morning on a charge of constructive felony. He was brought before Mr. Justice Badgley in Chambers, who in the exercise of his discretion, granted the application to change the venue to Montreal. When the case came before him (Mr. Justice Ramsay), the question was whether Mr. Justice Badgley, had properly exercised his discretion, and he (Mr. Justice Ramsay) held that he had no authority to decide that. *Exp. Corwin*, M. Judgment rejecting the application 20 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 104, 2 Leg. News 364.

Under sect. 11 of 32 and 33 Vict., cap. 29, a judge of the Court of Queen's Bench, sitting in the Montreal District may direct the trial of a person charged with the commission of an offence in the Quebec district to take place in Montreal, the power to change the venue not being limited to a judge sitting in the District where the offence is alleged to have been committed. *Exp. Brydges.* M. Judgment, Q. B., Cr. side, 9 Ap. 1874. Ramsay, Sanborn, JJ. Rep. 18 J. 141.

§ 36. *Verdict v.* JURY.

§ 37. WRIT OF ERROR.—Error only lies for matter of record, so the charge of the judge will not be ground of error, as it is not of record. *Defoy & The Queen.* M. Judgment 21 June, 1877. Monk, Ramsay, Tessier, Sicotte, Bélanger, JJ.

On the hearing of a Writ of Error from the Crown side of the Court, the judge, who sat in the proceedings now under examination for error, is disqualified. C. S. L. C. cap. 79, sects. 4, 56 & 67. *The Queen & Dougall et al.* M. Judgment 19 March. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ

v. HABEAS CORPUS.

CROWN *v.* **LETTERS PATENT.**—The privilege of the Crown for its claims over those of private competing creditors is to be governed by the Civil Law of the Province of Quebec, derived from France, and not by the law of England.

Under C. C. P. 611, in the absence of any special privilege, the Crown has a preference over chirographic creditors for deposits due to it by a bank in liquidation. *Regina & The Exchange Bank.* M. Judgment reversing 2 April, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ. Sir A. A. Dorion, C. J., dissenting. Rep. M. L. R. I. Q. B. 302.

CURATOR.—The father of an interdicted person ought of right to be appointed curator, in the absence of any grave objection to such appointment, even when the majority of the family council thinks otherwise. The insolvency of the father is not of itself a sufficient reason to exclude him from the curatorship. *Dufaux & Robillard.* M. Judgment reversing, 27 January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, J. Dis. Rep. 20 J. 288, 7 Rev. Leg. 470.

Un curateur à une succession vacante ne représente que la succession et le défunt, et qu'il ne peut demander la nullité d'un acte fait par le défunt en fraude de ses créanciers. Cette action n'appartient qu'aux créanciers. *Lamarche & Pauzé.* M. Judgment reversing, 31 Oct., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 3 Dec. d'A. 265.

When persons assume the duties of curator to an interdicted person and the control of his property, they will be responsible for their administration, and accountable as if they had been regularly named curator to the interdict.

Where relatives of the interdicted persons make an act *d'accord* by which they agree to maintain such interdicted person for his revenues, which are not large, nor more than necessary for his support, the heirs of the person interdicted will be bound thereby. *Corbeil & St Aubin et al.* M. Judgment reversing, 26 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

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DAMAGES.—"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." Art. 1053 C. C.

A proprietor is liable to his neighbour for carrying on a trade which causes offensive odours and is unhealthy, by which the value of the neighbour's property is diminished, and this although the business had been established before the plaintiff had so used his property as to make the nuisance felt. *St Charles & Doutre.* M. Judgment confirming, 20 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Rep. 18 Jurist, 253.

Where a mill owner places such obstructions in a river *flottable* though not *navigable*, as will prevent other persons using the river to float logs, or as will render its use more difficult for that purpose, such mill owner may be condemned to pay damages. *McBean & Carlisle et al.* M. Judgment reversing, 21 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J., 276. Another action of damages as to the same or a similar construction at the same place, was instituted, but the evidence showing that the pretended obstruction did not cause any impediment to the floating of logs, the action was dismissed. *McBean & Carlisle et al.* M. Judgment confirming, 22 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

Damages for stopping supply of water to a mill. *Brodie & Frothingham.* M. Judgment confirming, 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

An action of damages will lie for opening a water course on a neighbour's property without authority. *Dastous & Nolan.* Q. Judgment confirming, 4 March, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

An action for damages will lie for an illegal combination to prevent a party carrying on business, as for instance for the builders and quarrymen to combine that a certain contractor shall not be allowed to purchase stone quarries. *Bertrand & al. & Perrault & al.* M. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The purchaser of stolen timber who has participated in the theft, either before or after the committing of the offence, is liable in damages to the proprietor, although he may have paid for the wood he received. *DeBeaujeu & Perry.* M. Judgment reversing (as to the evidence only, for in the Court below the principle does not appear to be ignored) September, 1875. Dorion, C. J., Taschereau, Ramsay, Sanborn, JJ. Sanborn, J. dis.

All who participate in an offence or quasi-offence (délit ou quasi-délit) are jointly and severally liable for the loss or injury resulting therefrom, and therefore persons who have wrongfully cut and carried away wood which did not belong to them are jointly and severally liable to the owner for the value thereof. *Lalonde & al. & Bélanger.* M. Judgment confirming, 17 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 96, 3 Leg. News 26.

A Priest is liable for malicious and calumnious words used by him in preaching or otherwise addressing his parishoners in Church. He is not liable for words used in admonishing his parishoners against any notorious scandal, or attempt to alienate his parishoners from their religious belief, although the nature of the admonition incidentally implies, but does not expressly

formulate, a rebuke against a particular person.

A Priest's advice to a parishoner to avoid going to a certain place where conversation injurious to his religion is indulged in, is privileged, and this although it may be injurious to the trade of the person u-ing or permitting such language to be used, and although the priest be aware that the effect of advising his parishoners not to frequent such place will be detrimental to the trade of such person. *Messire Blanchard & Richer.* M. Judgment reversing, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Sanborn, J. dis.

Where the libel complained of is only the answer to personal and injurious attacks, no damages will be allowed. *Beers & Bowkers.* Judgment confirming, M. June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The use of the expressions *dol and fraud* in an action are not necessarily libellous. And an action to set aside a deed on the ground of *dol and fraud* is not libellous, if the allegations be made with propable cause and without malice, although the party making the allegation fails in his suit also. A complaint to the council of the bar is not a libel even if the complaint be rejected, if it be made with probable cause and without malice. *Barthe & Boudrealt.* Judgment reversing Q. 7 June, 1878. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ.

A medical practitioner is liable in damages for maliciously publishing, in an action against his patient for fees for his services, the nature of the malady for which such services were rendered. And malice will be presumed from the publication. *H. & T.*, Q. Judgment reversing, 5 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R. 267. 9 Rev. Leg. 579. 2 Leg. News 202.

In a civil action for damages for verbal slander, the truth cannot be

pleaded as a defence, unless it be that the occasion justified the statement, and that there was no malice. The charge in the criminal law does incidentally affect the civil recourse. *Fahey & Baxter.* M. Judgment confirming, 11 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

If a neighbour builds on a wall not *mitoyen*, without the consent of the owner, he will be compelled to demolish the construction so illegally made and to pay damages. *Hart & al. & Joyce.* M. Judgment reversing, 22 June, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 209. Confirmed Supreme Court. 1 S. C. Rep. 321.

Damages for assault will be allowed a plaintiff who has been assaulted, although he may have been to blame in using abusive and provocative words. The right of an hotel-keeper is to put a troublesome guest out of the house, but in so doing he must justify having used the least violence possible. *French & Marks.* M. Judgment confirming. Rep., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

A trespass will not justify an assault of an aggravated character. So where two people pretend to be legally entitled to a wharf, and one puts wood upon it, which the other proceeds to remove with a great force of men, and a scuffle ensues, and the owner of the wood is seized and severely beaten, he will be entitled to recover damages from his assaillant. *Methot & Burke.* Q. Judment confirming, 4 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

An hotel is a place of resort and it is an assault, for which an action of damages will lie, for an hotel-keeper to reject a person, even one not resident in his hotel, by violence, when making use of the hotel in the usual manner. *Hogan & al. & Dorion.* M. Judgment confirming, 28 April, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 238.

The *riverain* proprietor may recover damages against the owner of a raft for mooring his raft opposite the property of Plaintiff, and close to the shore, not being driven there by stress of weather or any necessity of navigation, and leaving it there, so long as to create a nuisance. *Dunning & al. & Girouard & al.* M. Judgment confirming, 16 March, 1877. Dorion. C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 177.

A contractor carrying out a contract under powers enabling him to expropriate, cannot violently dispossess a person of his house, and he will be liable in damages for so doing. *Holden & Mann.* M. Judgment confirming, 14 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk J. dis. Rep. 1 Leg. News 52.

Damages may be recovered from the employer of a workman, who slipped while working for Defendant a contractor, on the roof of a house, and so let fall a blunt instrument, which wounded Plaintiff and caused him serious damage. Art. 1054 C. C. *Deblois & Glass* Judgment confirming, 16 March, 1887. Monk, Ramsay, Sanborn, Tessier, JJ.

Celui qui, sans raison et par pure malice, fait arrêter quelqu'un, et le fait emprisonner temporairement, sera condamné à lui payer des dommages. *Fraser & Gagnon.* Q. Judgment confirming. 8 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11. R. Leg. 517.

Where a party misappropriates money given him for a special purpose, and the lender lodges a criminal information against him, but suspends the execution in order to force the offender to a settlement, an action for malicious prosecution will lie. *Loranger & Willett.* M. Judgment reversing, 22 June, 1874. Dorion, C. J., Taschereau, Ramsay, Sanborn, Loranger, JJ. Ramsay, Sanborn, JJ., dissenting, being of opinion that although there was an evil motive on the part of Respondent, there was probable cause, and therefore Respondent was not liable. Rep. 23 J. 184, 9 Rev. Leg. 656.

Where a party without malice but unjustifiably, arrests another, who without going to gaol makes a transaction as to the debt and costs, without any special reservation of his right to damages for false arrest, it will be presumed that he waived any such right to damage. *Lapierre & Gagnon.* Q. Judgment reversing, 7 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross. JJ. Tessier J. dis. Rep. 8 Rev. Leg. 727, 1 Leg. News 32.

A woman unlawfully appropriated some ice without the intention of stealing, probably only intending to annoy her neighbour, who prosecuted her for larceny. *Held*, she was not entitled to recover damages, as the prosecutor had probable cause for the prosecution. *Ryan & Laviolette.* M. Judgment confirming, 14 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 289.

Plaintiff was condemned to pay certain costs in a prosecution before Justices. He paid the costs to one of the Justices, who kept the money. The Plaintiff was arrested for non-payment. *Held*, that the payment to the justice was not a sufficient payment, and the arrest being legal, the action was dismissed. The Court of Appeal confirmed this judgment. *Rousseau & Lanouette.* Q. Judgment, 6 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Damages cannot be recovered against a person who, in good faith, arrests another under a judgment, although such judgment be erroneous. *Langlois & Normand & al.* Q. Judgment confirming, 8 Sept., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 6 Q. L. R. 162.

A public officer in the discharge of his duties seized a quantity of furs for contravention of the game laws, and the seizure was maintained by a magistrate. The action goes on the ground

that the magistrate exceeded his jurisdiction; but no steps were taken to set aside his decision. *Held*, that the Court cannot incidentally decide as to the extent of jurisdiction of the magistrate. *The Governor & Company of Adventurers & Decoteau.* Q. Judgment confirming, 7 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

Where a corporation is sued for illegal arrest by its officers, it is sufficient for the defendant to show that the officer had probable cause.

Where a person not licensed to sell was arrested while writing down orders for the house which he represented, that the police officer had probable cause for the arrest, under a by-law of the corporation forbidding to sell without license. *La Corporation de la Cité de Québec & Piché.* Q. Judgment reversing, 6 December, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 8 Leg. News 18, 11 Q. L. R. 249.

In an action of damages for an accusation of perjury, it is not justification to say that defendant swore in an affidavit in support of a *pétition en destitution de tutelle* that the *assemblée de parents* took place at the house of one Major, instead of at the office of the Prothonotary, where it really took place. and that the meeting was secret, and the nomination of the tutor fraudulent, unless it appears there was a wilful intention to mislead; and such intention will not be presumed, if there been sufficient circumstances surrounding the nomination of the tutor to justify suspicion of fraud, although fraud may not have been sufficiently established. *Major & al, & Lalonde.* M. Judgment confirming, 2 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Where a merchant sent false excuses for not paying a commercial debt, made a defence to a suit in bad faith, made a false statement to his creditor's collector as to the debt, and started for England without having made any arrangement to meet his obligation, and when moreover on being requested by his creditor in Montreal to pay him, the debtor answered he might get his money as he could, there is probable cause for his arrest, even although in fact the debtor may not have really intended to defraud his creditor ultimately, or to go away from the county with intention to avoid payment. *Shaw & Mackenzie.* Judgment confirming, 12 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Dorion C. J., and Cross, J., dis. Rep. 3 Leg. News 369, 1 Dec. C. d'A. 25. Reversed in the Supreme Court, where it was considered that damages were due as the affidavit was defective, and that the evidence showed that the respondent had no reasonable cause for issuing the writ of *capias.* Judgment 3 March, 1881. Ritchie, C. J., Strong, Fournier. Henry, Taschereau, Gwynne, JJ. Rep. 6 S. C. R., 181. (1)

Notice of action of damages for false arrest, before suit against a public officer, omitting to state where the act complained of was committed, or the residence of the Plaintiff's Attorneys, is insufficient.

The "Loyal Orange Institution" is an unlawful combination and confederacy, the members being bound by an oath to keep secret the proceedings of the Association, and therefore there was probable cause for the arrest of the Plaintiff, who was joining in an Orange demonstration likely to lead to a breach of the peace. *Grant & Beaudry*, M. Judgment confiming, 18 November, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 4 Leg. News, 393, 2 Dec. d'A. 197.

Seizure of goods in execution before the delay of fifteen days had elapsed, held to be justifiable, the seizing party having *reasonable cause* to suppose the

(1) NOTE.—This decision in the Supreme Court is not only remarkable as justifying conduct of, it is to be hoped, an unusual character in Toronto, but as seeming to favour the idea that the imperfections of the affidavit are a ground of damages.

Appellants were making away with there effects, and there being no malice and no damage, the action was dismissed. *Martin et al. & Roy.* M. Judgment reversing, 13 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ., Ramsay, & Tessier, JJ. dis.

Where untruthful accusations of dishonesty are made against a school trustee, it will be no excuse to say that the expressions were used with regard to his actions as a school trustee and were not intended to attack his general character. *Powell & Walters.* Q. Judgment reversing, 7 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ., Monk & Cross JJ. dis. Rep. 8 Leg. News 656.

A proprietor of a town lot is not liable in damages for building on his property although the effect may be to accumulate the rain water on the roof, and divert it to the ground differently from the natural fall of the water. In other words, building a house or houses on a town lot of land is a legitimate use of the property. *Girard & Lepage.* Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn JJ. Dorion, C. J., dis.

Where the condition of a private place is such as to invite strangers to go there, and one so invited goes on to the property and is injured owing to the bad state of a gateway, it will not be an answer to his action of damages to say he was a trespasser. So where a stranger crossed a railway towards a gateway opening off the railway and one of the gate posts being in bad order, fell upon him, the company will be liable in damages. *North Shore Railway Company & Jackson.* Q. Judgment confirming, 8 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ.

A Plaintiff who has suffered damages from fire in the woods which began on a neighbor's land must show that the fire was lighted by the person sought to be made liable or by his order. *Turcotte & Rioux.* Q. Judgment reversing, 5 Sep. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 363.

An action for damages for a trespass on lands of Plaintiff against one of the trespassers for his share of the damage, does not bar an action against a joint-trespasser, unless it be proved that Plaintiff has been fully indemnified. *Corporation of St-Gabriel West & Hatton.* Q. Judgment confirming, 6 March, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk & Sanborn JJ. dis. Rep. 8 Rev. Leg. 293.

An action for damages *ex delicto* is not suspended by the suggestion of the death of one of the Defendants sued as jointly and severally liable. *Allan & McLogan.* M. Judgment, 14 Dec. 1877. Monk, Ramsay, Tessier, Cross, Taschereau, JJ. Rep. 1 Leg. News 4.

The prescription of two years under art. 2261, par. 2, C. C. is not applicable to a claim of damages for the value of property wrongfully taken, against the person who has taken it. *Lalonde et al. & Bélanger.* M. Judgment confirming. 18 Dec. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 24 J. 96, 3 Leg. News 26.

The *tiers-détenteur* who has made improvements on property hypothecated. and who is personally liable for the debt, cannot remove the improvements after the judgment condemning him to *délaisser*, and the hypothecary creditor may recover damages from the *tiers-détenteur* for removing the improvements. *La Société Canadienne & Lapointe.* M. Judgment reversing, 29 January, 1881. Rep. 1 Dec. d'A. 183.

Damages for refusing to make certain works to test whether there were minerals on lands. Question of interpretation of contract. *Barsalou & Beaupré.* M. Judgment reversing, 18 Sep. 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ.

A corporation having the control of the streets and foot-paths is responsible in damages to any one injured by their

being out of repair. *Grenier & The Mayor &c. of Montreal.* M. Judgment reversing, 15 Sep. 1876 Dorion. C. J., Monk. Ramsay, Sanborn, Tessier JJ. Rep. 21 J. 296.

Where an action is brought against a Municipal Corporation for damages suffered owing to the road not being kept clear of snow, the action is not demurrable because it does not allege opposite what lot of land the damage was sustained. *Patrick & Corporation of L Avenir.* Q. Judgment reversing, 6 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 321.

A municipal corporation is liable in damages for the bad state of its streets. *Kelly & The Corporation of Quebec.* Q. Judgment reversing, 7 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Monk & Cross, JJ., dis. Rep. 10 Rev. Leg. 605.

Municipal roads are under the control of the municipality, by whatever system they are maintained, therefore the municipality is personally liable for damages arising from their being in a bad condition. *Martin & The Corporation of the Township of Ascot.* M. Judgment reversing, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 227.

A municipal corporation is liable in damages for injury to one of Plaintiff's horses, in consequence of the winter road not having the width required by art. 835, M. C., that is seven feet between the two ranges of *balises. Corporation of St. Christophe of Arthabaska and Beaudette.* Q. Judgment confirming, 6 Dec. 1879. Sir A. A. Dorion, C. J., Monk Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R. 316. 10 Rev. Leg. 591.

The Corporation of Montreal is liable for damages caused to a proprietor by the inundation of his house by the bad state of the drains of the Corporation. *The Mayor and Corporation of Montreal and Bourgouin.* M. Judgment

confirming, 19 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

A municipal corporation obliged to keep up a fence on a railway-road is liable in damages to the neighboring proprietor for not doing so. *Senecal & Corporation of County of Chambly.* M. Judgment confirming, 26 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A railway company was permitted, by the act incorporating it to pass its line through certain streets of the city of Quebec, with the consent of the corporation of Quebec, so as to guard the inhabitants thereof, and their property from injury, from the location or construction thereof,' 16 Vic., c. 100, sect. 3. The municipal corporation granted leave to the railway company to pass their line in a street where respondent had property, to his great damage. Respondant sued the corporation for indemnity. *Held,* that the corporation was not liable. (1) *Renaud & Corporation of Quebec.* Q. Judgment reversing, May 1884.

Where an accident occurred on the track of the Montreal City Passenger Railway Company, and it was proved that the rail was laid as required by the charter of the company, and that the roadway at the time of the accident was in good order: *Held,* that the plaintiff could not recover for an accident caused by the wheel of his vehicle catching on the raised part of the rail. *The Montreal City Passenger Railway Co. & Parker.* M. Judgment reversed, 27 May, 1884. Sir A. A. Dorion, C. J. Monk, Ramsay, Cross, Baby, JJ. Reported 7 Leg. News 194, 8 Leg. News 396.

NOTE.—In the case of the same company, Appellant, and the Montreal Brewing Company, respondent, (an action for damages to the vehicle), a similar judgment was rendered.

A person driving a vicious horse is

(1) See Judgment of Superior Court. 8 Q. L. R. 102. Ed.

liable in damages for injury done to the carriage of another who is not in fault. Art. 1055, C. C., al. 1. *Mercier & Guay.* Q. Judgment confirming, 6 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where a horse driven by its owner shies at some ordinary object on the road, and becoming uncontrollable injures the carriage of another, who was in no way in fault, the owner of the horse is liable for the damage.

Where there is no malice the damages will be assessed with moderation, there being no malice and little negligence. *Rougeon & Contant.* M. Judgment reversing, 23 January, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ., Baby, J. dis. Reported 4 Dec. d'A. 30.

The owner of an animal is responsible for the damage caused by it, whether it be under his own care, or under that of his servants, or have strayed or escaped from it. He who is using the animal is equally responsible while it is in his service. 1055 C. C.

A proprietor is liable in damages for snow falling from the roof of his house, where it had been negligently left to accumulate, and by which a horse was frightened and ran off, overturning defendant's carriage and injuring him personally. *Dawson et al. & Trestler.* M. Judgment confirming, 16th Dec., 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk, Ramsay, JJ., dis. Rep. 5 Leg. News 114. 2 Dec. d'A. 115.

A corporate body (teachers) will be liable in damages for carelessness in discharging a cannon on its own property by which the Plaintiff's husband was killed on his own property at a distance of four arpents. And the complicity of the Corporation will be presumed from proof of one of the professors being present directing the operation. *Les Clercs Paroissiaux de St-Viateur & Labelle.* M. Judgment confirming, 4 Feb. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 83.

An action of damages which sets forth that a corporation unlawfully, in constructing a front road, tore down Plaintiff's fences of certain lands described in the declaration, such description not including Plaintiff's land, is not demurrable. *Whitman & The Corporation of the Township of Stanbridge.* M. Judgment reversing, 18 Sept., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J. dis. Rep. 32 J. 176, 1 Leg. News 474, 9 Rev. Leg. 652.

An Hotel Keeper was given a mare to keep. He was unable to return it, and said it has been stolen from his pasture by night, but that he was in no way responsible, for that the bargain was made with the son. *Held* that the bargain was only made with the son who was acting for the father at the hotel, and that it was ratified by the Defendant. *Léonard & Levy.* M. Judgment confirming, 25 Jan., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Baby, J. dis.

Where a landlord injures his tenant by negligence, in making alterations and repairs, damages may be recovered. *Jolicœur & Moisan.* M. Judgment confirming, 3 February, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

If water-pipes of a bad and insufficient kind burst in a leased house, and damage the tenant's property in the house, the landlord will be liable in damages. *Mann & Munro.* M. Judgment confirming, Sept. 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

And another tenant in possession of the portion of the premises where the break actually took place will not be liable as garant of the landlord. *Mann & Nield.* Judgment confirming. *Ib.*

Negligence of lessee. Damages. *D'Anglais & Lochead.* M. Judgment confirming, 3 Feb., 1876. Monk, Ramsay, Sanborn, Tessier, Sicotte, JJ.

Comparison of our article 1629 C. C. (1) and the art. 1733 C. N. (2) *Semble* by the majority of the Court, that the rule of our article is the same as that of the C. N. *Steele & Jamieson.* M. Judgment reversing, 22 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay & Tessier JJ. dis. are of opinion that it is sufficient for the tenant to show reasonable cause, and that he is not absolutely obliged to establish *cas fortuit.* Confirmed in Privy Council.

A lumberman whose logs drift on to the land of a *riverain* proprietor is liable for the damages caused to the land, if he does not use due diligence in preventing the logs becoming stranded on the land, or, if that be impossible, if he does not use due diligence in removing them. *Morneau & Atkinson.* Q. Judgment reversing, 5 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Damages are due by persons lumbering who leave their logs on the low lands by the river-side and so cause injury to the proprietor. *Guilmoy & Methot.* Q. Judgment confirming, 4 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

A steamboat company is liable in damages to a passenger injured on a wharf, where one of the company's steamers stopped to land its passengers, by falling at night down a slip which was not not protected by any railing, and which was not indicated by lights. *Borlase & St. Lawrence Navigation Co.* Q. Judgment confirming, 7 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep., 1 Leg. News, 32.

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(1) When loss by fire occurs in the premises leased there is a legal presumption in favor of the lessor that it was caused by the fault of the lessee or of the persons for whom he is responsible; and unless he proves the contrary he is answerable to the lessor for such loss.

(2) Il (the tenant) répond de l'incendie à moins qu'il ne prouve que l'incendie est arrivé par cas fortuit, ou force majeure, ou *vice* de construction. Ou que le feu a été communiqué par une maison voisine.

Action for damages to cargo of tea by the use of chloride of lime which it was alleged had impregnated the tea with an offensive odour. *Held,* that the evidence did not establish the fact of damage satisfactorily, so as to charge the ship, and that due diligence had not been used to notify the ship-owner of the damage. *Moore & Harris.* M. Judgment confirming, September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Monk J., dis.

Killing cattle on a railway by a train. a railway company running a train on another Company's line and killing cattle that have wandered on to the line owing to the insufficiency of the fences, is liable in damages to the proprietor of the cattle, on the principle that such company is using the line when in an unfit state. Evidence that the railway fences were in a bad state will give rise to a presumption that the cattle got access to the track owing to the bad state of the fences. And it is no answer to the action that Plaintiff's line fences were not constructed, and that cattle wandered on to the track through a neighbour's land. The whole duty of fencing falls on the railway company. *The Central Vermont Railway Company & Paquette.* M. Judgment confirming, 22 Sept., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where a steamer by negligence came in collision with a barge and damaged her so that she sank with a quantity of peas on board, the steamer will be liable for the damage to the peas. And the action may be brought by the Insurance Company, which has paid the freighters in the name of the owners, and that subrogation took place by operation of law, and that the owners of the steamer were sufficiently notified of the extent of the accident, by notice given the day after; that the captain of a barge navigating the inland waters of the St. Lawrence was not expected to have the highest nautical skill, all that is required is that he should use ordinary care. *The Richelieu & Ontario Navigation Company & Lafrenière et al.* M. Judgment confirming, 14 June, 1879.

Sir A. A. Dorion, C. J.. Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 204.

A barge which suffers damage by a steamer owing to the former having failed to exhibit a white light in accordance with the requirements of law, cannot recover compensation in damages from the steamer. *Peloquin et al. & The Sincennes McNaughton Line.* M. Judgment confirming, 22 June 1876. Dorion, C. J.. Monk, Ramsay, Sanborn, Tessier JJ. Tessier J. dis. Rep. 9 Rev. Leg. 8.

A contractor is liable in damages for *vice du sol* which renders his work defective. *Bastien & Wilson.* M. Judgment confirming, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier JJ.

A contractor may by his contract stipulate that he shall not be liable for the plan of the works he is to execute. *St-Patrick's Hall Association & Gilbert et al.* M. Judgment confirming, 29 Jan. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 23 J. 1, 1 Leg. News 116. 9 Rev. Leg. 612.

Conclusions for damages resulting from seduction may be taken by the mother, in an action *en déclaration de paternité. Kingsborough & Pound.* Q. Judgment confirming, 5 March. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross. JJ.

The purchaser of a cargo of coal is liable in damages for the demurrage incurred by the ship, owing to the purchasers not being ready to receive the coal, according to the rate at which it should be delivered. *Beard & Hart et al.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ.

Risk of calling.—One of the hands on board the steamer, whose duty it was to overlook the operation of transferring goods to a passing steamer, fell over-board while this was being done, and before help could reach him he was drowned. His widow, for herself and children, sued the company in damages, attributing fault, inasmuch as there was only one cable used to attach the steamer instead of two, and that the captain had not used the necessary diligence after the man fell into the water.

Held, that there was no contributory negligence on part of the man (Paulet). that the operation was being performed in the ordinary way and with reasonable care, that Paulet had special charge of the work, that therefore there was no fault on the part of the company Appellant, Paulet having lost his life owing to the ordinary risk accompanying his calling. *Richelieu Navigation Co. & St-Jean.* M. Judgment reversing, 17 Dec. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ. Tessier J. dis.

Where the damage results from an accident, without fault on either side. the loss is borne by the party who suffers it; and when the suffering party alone is in fault, the loss is borne by him. So where a laborer employed in discharging railway iron through the hatch of a vessel, by his imprudence and disregard of orders, caused the breaking of a chain which was sufficiently strong for the purpose for which it was used, it was held that the damage which he suffered must be borne by himself alone. *Desroches & Gauthier.* M. Judgment reversing. 20 Nov. 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Tessier J. dis. Rep. 5 Leg. News 404. 3 Dec. d'A. 25.

Contributory negligence.—Beaupré & The Montreal Tow Boat Co. M. Judgment confirming, 2 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ.

The Corporation of Quebec having opened a hole in the street for certain repairs, or allowed it to be opened, is not responsible in damages to a person driving into the hole, which was not protected and no light kept burning at night if the party was driving at the rate of eight miles an hour. *Gray & Mayor &c of Quebec.* Judgment confirming,

5 June 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Ramsay J. dis. said that to make contributory negligence two things were necessary. 1st there must be negligence. 2nd the negligence must contribute to the accident. He did not think that driving at eight miles an hour was negligence, and it was not proved nor rendered probable that Appellant's carriage falling into a hole made in the middle of the road, would have been less, had it been going at the rate of six miles an hour.

Where a carter knowing the danger to which he exposes himself, goes on a wharf to load wood, and approaches too near to a vessel hauling into the wharf, and the chain breaks and injures the carter, he cannot recover from the captain of the vessel as he voluntarily exposed himself to danger. *Periaux & Dompierre.* M. Judgment reversing, 14 Dec. 1877. Sir A. A. Dorion. C. J., Ramsay, Tessier, Cross JJ. Tessier J. dis.

Part of the highway under the charge of the trustees of the Montreal turnpike works, was interrupted by works authorized by Statute to alter the Montreal water works. and the Corporation of Montreal made a temporary road to keep up the communication of the turnpike road. This temporary communication was defective. and a cabman's horse and vehicle were injured there. *Held,* that the Turnpike Trust was liable for the damage. *The Trustees of the Montreal Turnpike Roads & Daoust.* M. Judgmeut confirming, 21 Sept. 1878 Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Ramsay & Cross JJ dis. Rep. 23 J. 175 9 Rev. Leg. 651.

Where works for the construction of a railway, authorized by statute, passing in the street of an incorporated town, injure the property of an individual, his action for damages will lie against the railway company and not against the Municipal Corporation. *Lambert & The Corporation of Three Rivers.* Q. Judgment reversing, 5 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dissenting. Rep. 10 Rev. Leg. 359. Also *The Corporation of Three Rivers & Lessard,* decided same day. Rep. 10 Rev. Leg. 441.

An action will lie against a municipal corporation for the bad state of a road under its control owing to railway works carried on under a statute, and the contractor may be called in as *garant. McGreevy & The Corporation of Three Rivers.* Q. Judgment confirming, 8 Sept., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dissenting thought the corporation was not liable, as was held in the cases of *Lambert & the Corporation of Three Rivers,* and *Lessard* against the same corporation, and that thereforefore there was nothing to *garantir.* Secondly, that if the contractor was acting under the statute, and within its powers, the railway company and not he, was liable, unless the contractor had agreed to pay the damages necessarily arising from the works, which did not appear to be the case.

Une compagnie de chemin de fer qui par ses travaux de terrassement, empêche l'écoulement des eaux d'une propriété que longe son chemin, sera responsable des dommages causés par l'eau à cette propriété. *Grand Trunk Railway Co. & Landry.* Q. Judgment confirming, 8 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 11 R. Leg. 590.

The contractor is liable to the owner of a barge for damage done to it by striking against the public works he was constructing, although the line of the works was visible by the posts or piles used for its construction, because there were no buoys to indicate the proper channel to be followed. *Moore et al. & Paquet.* Q. Judgment confirming, 4 Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. thought the accident to the Respondent's barge was due to his own negligence. He knew or ought to have known of these works, and the outline of the works was visible. It was not

the duty of the contractor to buoy out a new channel.

The damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he has been deprived, &c. Art. 1073 C. C.

Evidence of how much grain a grist mill could grind is not a satisfactory measure of damages for the stopping of a mill, unless it be shown that there was grain to be ground to employ the mill continually.

Where damages of this sort are complained of, it will be considered unfavorable to Plaintiff, and expose the testimony he adduces to suspicion, if he refuses an examination of his premises by a competent person of respectability, such as an engineer sent by defendant. *DeBeaujeu & Beaudet.* M. Judgment reversing, 15 June, 1877. Sir A. A. Dorion, C. J , Monk, Ramsay, Sanborn, Tessier, JJ.

In an action of damages against a builder for want of skill in using a defective plan, the measure of damages is not what the Plaintiff paid for altering the bad plan to a better, but what he had paid for the faulty construction and what he had lost by it. *Nordheimer & Reid et al.* M. Judgment confirming, Sept., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The value of a deficiency in quantity of lands sold may be recovered by an action of damages, and the diminution of price allowed by Art. 1201 C. C. is only a measure of damages. *Doutney & Bruyère et al.* Judgment reversing, 21 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 17.

The Appellant was condemned by the Superior Court to pay $18,333.45 damages. The case being taken to review, the judgment was confirmed, save as to the amount of damages, which was reduced to $13,500. This amount was further reduced by this Cour tto $10,000, and on further appeal to the Privy Council the amount was still further reduced. *Osborne & Atkinson.* Q. Judgment Q. B., 8 Sep., 1875. Dorion, C. J., Monk, Ramsay, Sanborn, Caron, JJ.

Where damages are sought for the inexecution of a contract, and no real and certain damages are proved, the Court may condemn the Defendant in default to pay exemplary damages. *Girard & Lepage.* M. Judgment confirming, December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a right of action exists and the court of first instance has allowed trifling damages, (in this case $12) although no actual damages were proved, the Court of Appeals will confirm the judgment. *The City of Montreal & Workman.* M. Judgment confirming, 21 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Routhier, JJ.

Damages may be recovered for physical and mental suffering caused by a wound inflicted by defendant, where there was only negligence. *Pelletier & Bernier.* Q. Judgment confirming, 6 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Monk, J. dis. Rep. 3 Q. L. R. 94, and 9 Rev. Leg. 338.

The failure to pay money at the proper time can only give rise to the immediate and direct damages resulting therefrom, which are limited by law to the legal interest on the sum. But an obligation to give debentures bearing interest is not to be treated as a mere obligation to pay money, and nominal damages may be allowed for default, without proof of actual damages. *The Corporation of the County of Ottawa & The Montreal, Occidental Railway Co.* M. Judgment confirming, 27 Nov. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice and Cross J. dis. Art. 1077 C. C.

The measures of damages for a faulty plan is not what Plaintiff paid for altering the bad plan to a better, but what he had paid for the faulty construction and what he had lost by it. *Nordheimer*

& Reid et al. M. Judgment confirming, September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where the legislature authorizes works in a public river, and a person navigating such river runs upon these works and suffers damage, he cannot claim damages from the persons to whom the right to make such works is conceded.

But where the works to be made are to be such as will not obstruct the navigation, and in fact they do obstruct it, the *concessionnaires* will be liable.

And this liability will not cease, although by the terms of the act the plan to the works was to be submitted to the Governor, and was actually so submitted and sanctioned by him.

The loss of the use of his vessel, damaged by the accident, during the spring of the year, in the absence of any evidence of want of diligence in repairing it, is a good measure of damages. *The Pierreville Steam Mill Co. & Martineau.* M. Judgment confirming, 21 Dec., 1875. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Sicotte, J. dis. Rep. 20 J. 225.

Excessive damages will be reduced by the Court of Appeal. *Jolicœur & Voisard.* M. Judgment reducing damages, 3 Feb., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

That excessive damages will be reduced, and where sufficient compensation has been tendered and refused, all subsequent costs will be against Plaintiff. *DeBeaujeu & Beaudet.* M. Judgment reversing, 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

And where the Court of Review was modified, a judgment giving excessive damages for a trespass, the Court of Appeal will confirm the judgment in review. *Mann & Macdonald.* M. Judgment confirming, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The Court of Appeal will reduce damages awarded by the Court of First Instance if they are excessive. So where a labouring man had a difficulty with a person to whom he had sold a load of wood, as to whether he was to be paid for it or the amount was to be set off against a debt he owed to the purchaser, and the vendor wished to carry off the wood which was still in Plaintiff's cart, but in Defendant's yard, and the purchaser wished to retain the wood and Plaintiff accidentally had the end of his finger crushed, it was *held* that $3,000 was an exorbitant amount of damages and that it should be reduced to $600. *Desilets & Gingras.* Judgment reversing, 3 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 275. This case went to the Supreme Court, where the judgment in appeal was reversed and the original judgment was restored.

The case has not been reported in the Supreme Court Reports but from an allusion to it in another case of Levi & Reed, 6 S. Ct. Reps. 482, it is to be gathered that the Supreme Court thought that in reversing the judgment in the Q. B., they were following the precedent of the case of Lambkin & the South Eastern Railway Company. But that case, whether well or ill judged, was a jury trial and consequently any comparison with the case of *Desilets & Gingras* merely gives rise to confusion.

The Court of Appeal will not reverse a judgment for damages although the Court below may have slightly overestimated the damages. *Mondor & Quintal.* M. Judgment confirming, 19 January, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 175.

Where the evidence is conflicting, the Court of Appeals will not disturb a judgment for damages, which perhaps are estimated a little higher than they should be. *Robillard & Ferguson.* M. Judgment confirming, 16 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 119.

The Court of Appeal will not reverse on a consideration of conflicting evidence. *Lemelin & Poitras.* Q. Judgment confirming. 3 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Where in an action of damages the court below has allowed excessive costs, this court, although confirming the judgment, will exercise its discretion as to the costs of appeal. *Hogan et al. & Dorion.* M. Judgment confirming, 28 April, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Déc. d'A. 238.

Where no precise time is fixed for the acceptance of an article sold, the purchaser will be obliged to receive it in a reasonable time. His refusing to receive it will be a breach of contract, entitling the vendor to re-sell it, and recover any loss he may sustain on such resale from the first purchaser. *Larin & Cheepman.* M. Judgment reversing, 18 Sept., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 458. Confirmed in Supreme Court. 4 S. C. Rep. 349.

Where no special time for the execution of an obligation is stipulated by the contract a reasonable time is understood. But where no time is fixed for doing a certain thing, and it is stipulated that when that is done the party obliged to do it is to pay a certain sum of money, an action demanding absolutely the payment of the sum of money will not be maintained till the party is put *en demeure* to fulfil his obligation. *Beaudry et les Marguilliers de l'Œuvre et Fabrique de Montréal.* M. Judgment reversing, 15 June 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 218.

Where a contract was not carried out to the letter, but in the failure to do so there was no fraud, the contractor will be entitled to receive the price of the work he has done, less what it will cost the employer to finish the work. *Atkinson & Plamondon.* Q. Judgment reforming, 8 Sept. 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Breach of contract. When a party complains of a failure to deliver hay sold to him, and it is established that subsequently he had bought hay from the same party at a higher price, without protest, and he has never put the vendor *en demeure* to deliver the hay, it will be presumed that he has acquiesced in the non-delivery, and his action of damages will be dismissed. *Préfontaine & Brodeur.* M. Judgment reversing, 18 Sept., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where a person went without leave on the property of another, mere threats of using violence is not such a wrongdoing as will sustain an action of damages. *Cournoy & Laudon.* Q. Judgment confirming, 8 oct., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ.

Damages allowed for the failure to execute a contract to deliver four cases of phosphorous. *Evans & Brousseau et al.* M. Judgment confirming, 23 Sept. 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

An action of damages will not lie against a party to a previous suit by his adversary for an alleged false affidavit by which such party obtained a final judgment in his favour in the previous suit, for it is *res judicata. Boisclair & Lalancette.* M. Judgment reversing, 15 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 5 Leg. News 266. 1 Dec. d'A. 289.

"The debtor is liable only for the damages which have been foreseen, or might have been foreseen at the time of contracting the obligation, when his breach of it is not accompanied by fraud." Art. 1074 C. C.

In the case even in which the inexecution of the obligation results from the fraud of the debtor, the damages comprise only that which is an immediate and direct consequence of its inexecution." Art. 1075 C. C.

A party who seeks damages from a

municipal corporation for injury to his houses from the bursting of a water-pipe or the overflow from the hydrant must show that the damage he has sustained is the direct and probable result of the overflow. *L'Avenir & the City of Montreal.* M. Judgment confirming, 16 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The Sheriff is not responsible in damages towards a person indicted for felony by reason of the jury being illegally summoned, and the accused having been put to additional expense for his defence. *Danois & Bossé.* Q. Judgment confirming, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, J.J.

Damages are in some cases accorded by way of indemnity, as for an expropriation, where defendant has exercised powers conceded to him under a special act, and which interferes with the rights of property of another, although there is no reservation of the rights of others in the special act.

So it was held that a corporation is liable in damages for closing a street under statutory powers by which the Plaintiff's property is directly and exceptionally injured, although the Statute gives no express recourse for damages. That at common law it is equivalent to an expropriation, and therefore that the right given to close the street is to be understood to be given subject to any special damages occasioned to a proprietor. And further that the statute on which the street was closed formed only one of a number of statutes, all implying the principle of damage for such acts.

Held. also that the civil courts had jurisdiction over the matter, notwithstanding that such matters might come before commissioners. *The Mayor &c. of Montreal & Drummond.* Judgment confirming, 20 June 1874. Taschereau, Ramsay, Sanborn, Mackay, Torrance JJ. Mackay & Torrance JJ. dis. Rep. 18 J. 225.

In the Privy Council this case was reversed on the ground that the civil Courts had no jurisdiction, although not pleaded. The judicial committee also expressed the opinion that where a statutory power is strictly followed, no damages can be recovered, no matter what injury a proprietor suffers, unless there is a reserve for damages in the act.

A railway company is liable for the damage caused by its works, although performed within the powers conferred on it by statute. *La Corporation de Tingwick & The Grand Trunk Railway Co.* Q. 8 March 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 3 Q. L. R. 111, 9 Rev. Leg. 346.

Where the damage is continuous the action does not fall within art. 2261 C. C., unless there be a special plea to show the time when the damage ceased and that the period in question was more than two years previous to the institution of the action.

Damages may be recovered against a corporation acting under and within the scope of statutory powers where a special damage is sustained. *Grenier & The City of Montreal.* M. Judgment reversing, 3 Feb. 1880. Sir A. A. Dorion C. J., Monk, Ramsay, Cross JJ. Rep. 3 Leg. News 51.

The Corporation of the City of Montreal lowered the roadway of Little St-James Street in the said city, so that the access to the property of the Plaintiff and others, who owned real estate on the line of the street, was interrupted.

Held:—That an action lay against the Corporation by the persons aggrieved, for the recovery of the damages occasioned by the interference with their property.

The statute (Que.) 27 and 28 Vict. C. 60, does not exclude such action of indemnity, but merely provides a mode of procedure. If the Corporation desires to have the compensation estimated by commissioners, it must move the

Court to name them. If the Corporation does not by preliminary plea object to the adoption of the ordinary form of action by the Plaintiff, it will be held to have acquiesced, and cannot raise the objection afterwards.

In the present case no damages were proved beyond what had been compounded for by the Plaintiff. *D. Morrisson & The Mayor &c. of the City of Montreal.* M. Judgment confirming. 21 December, 1880. Monk, Ramsay, Baby, Doherty, Jetté JJ. Rep. 21 J. 1. 4 Leg. News 25, 1 Dec. d'A. 107.

Action of damages against the Corporation of Montreal for failing to carry out the stipulation of a deed of cession, by which Plaintiffs ceded to the said corporation, Defendant, the land of an unrecognized street, on condition that the said corporation should *faire sans délai, de la dite lisière de terre, une rue publique, sous le nom de la rue Lusignan, et devant être ainsi nommée à perpétuité, macadamisée, entretenue en aussi bon état et condition que les autres rues publiques de la dite cité.* The Court made an interlocutory order to the effect that the Corporation should perform its part of the agreement within six months. Plaintiffs appealed, and the appeal was dismissed. *Roy & The Corporation of Montreal.* M. Judgment confirming, 27, January 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ.

A young woman took a passenger ticket on a railway from St-A. to St-J. at the latter place the "conductor" failed to notify her that the train had reached her stopping place. Immediately after the train started again, thê passenger observed she was passing St-Johns, and threw herself out of the carriage and was injured. Her father sued the company in damages for these injuries. *Held,* reversing the judgment of the Court below, that the Company was only liable for the damages directly caused by the passenger being carried beyond St-J. (of which there was no evidence) but that the company was not liable for the damages resulting from her jumping off a train in motion.

The fault was her own. It might have been otherwise had the passenger been invited to descend by an official of the company. Arts 1053, 1054, 1074, 1075, C. C. *The Central Vermont Railway Co. & Lareau.* M. Judgment reversing, 27 May, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. 9 Leg. News 365.

Held, incidentally, that under the law of this Province a father has an action of damages against the wrongdoer for the death of his child, caused by the fault of the Defendant. And it will be no answer to such action to say that the child was too young for his services to be of any value, and that he was only a source of expense to the parents at the time. *Lord & La Compagnie du Chemin de Fer du Nord.* Q. Judgment confirming, 5 February, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ. Rep. 14 Rev. Leg. 297.

Le propriétaire d'un quai, non ouvert au public, n'est pas responsable, en dommages, de l'accident, même mortel, causé à un enfant qui avait mis pied sur tel quai dont l'état était très défectueux. *Lord & La Compagnie du Chemin de Fer du Nord.* Q. Judgment confirming, 5 February, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ. Rep. 14 Rev. Leg. 297.

Damages for taking out a capias improvidently. The Plaintiff, a jeweller desiring to increase his business, obtained advances from respondent, a wholesale dealer, and gave as security an hypothec on his proprety, on which he declared there were *mortgages,* but he only specified one of a certain amount. There was really another. Shortly after Plaintiff became insolvent, and respondent arrested him on *capias.* The court confirming the judgment of the court below, that there was probable cause for the arrest, although it seems the Plaintiff did not intend fraudulently to conceal the mortgage. *Grothé & Saunders.* M. Judgment confirming, 16 January 1886. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby JJ.

An employer is responsible for the damages suffered by an employee though the negligence or want of skill of a fellow employee.

Following *Ravary and G. T. R.*, 6 J., 49.) A direction to the jury that anguish of mind suffered for the loss of a husband may properly be taken into consideration by them in estimating the the damages which should be allowed to the widow, is not erroneous.

Where a witness arrived after the evidence at the trial was closed, but before the jury were charged, the exclusion of his testimony was not in itself a sufficient ground for allowing a new trial; but the Court will look to the relevancy and importance of the evidence which the witness was prepared to give, and where the affidavit of such witness is before the Court, and the testimony which he proposed to give does not appear to be relevant or material, a new trial will not be ordered on the ground that the evidence was excluded.

The fact that one of the jury, in the course of the trial, put a question to a witness which appeared to indicate a leaning to the side of the plaintiff, and the further circumstance that the jury presented her with their own taxed feas after the verdict was rendered, are not such indications of bias or partiality as to constitute grounds for a new trial. *Robinson & The Canadian Pacific Ry Co.* M. Judgment reversing, 16 Jan. 1886. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. M. L. R. II, Q. B. 25. 9 Leg. News 85. 4 Dec. d'A. 297.

Damages for wrongful imprisonment, An election of municipal councillors was held for the parish of Chateau-Richer, at which the Mayor (Appellant) presided, at the opening of the proceedings the president announced his intention to proceed with severity if there was any disturbance. Upon this high-words followed and threats of a very objectionable character were used. Thereupon the mayor secretly ordered the secretary to prepare warrants of arrest directed against the respondent and five others. These warrants were not executed till next day, when the warrants turned out to be for the commitment on conviction of each of the parties to gaol for ten days. Respondent was imprisoned and only released on *Habeas corpus.* He then sued appellant in damages. The defence in substance was that the appellant was acting in good faith, that the articles of the municipal code were obscure, and that he was not to be punished for an error in judgment. The articles of the M. C. relied upon by appellant are 300 and 301. They are in these terms: 300. "The person presiding at an election of councillors is a keeper of the peace from eight o'clock in the morning of the day on which the meeting of municipal electors is held, until nine o'clock in the morning of the day which follows the close of the election. He possesses in this respect all the powers of justices of the peace, and may exercise them throughout the whole municipality."

301. "The presiding officer at the election may moreover, for the purpose of preserving peace and public order:

1o. "Swear in as many special constables as he deems necessary;

2o. "Require the assistance of all justices of the peace, constables, or other persons residing in the municipality, by verbal or written order;

3o. "Commit on view to the custody of a constable or of any other person, for a period of not more than forty-eight hours, any one breaking the peace or disturbing public order;

4o. "By a warrant under his hand imprison such offender in the common gaol of the district, or in any house or other place of confinement established within the limits of the county municipality, for any period not exceeding ten days."

The court held that the imprisonment was wholly illegal. The powers of a justice of the peace in no case permitting the conviction of any person

without trial. Commitment on view any one troubling the peace for a short period, is not the power the president pretends to have exercised. It was evidently under the 4th ss. of Art. 301 M. C., he pretented to act. That disposition of the law is evidently to be read with art. 300, and could not be interpreted to mean that the president could secretly, and without a conviction, place a *lettre de cachet* of this sort in the hands of a bailiff to be executed almost at the moment the temporary functions of the president ceased. The majority of the court thinks this constitutes malice, as no one in this country can be presumed not to know that a person cannot be punished without a hearing. It is an elementary principle of justice. *Cloutier & Trépannier.* Q. Judgment confirming, 7 October, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. The Chief Justice and Monk, J., dissenting. Rep. 9 Leg. News 347. 14 Rev. Leg. 670.

A Line of railway running alongside of a street, and not divided by any fence from the street, is not a road on which foot passengers using it are entitled to the same protection as if they were walking on an ordinary highway. And so it was held that a person who was injured by falling over some planks lying on the track had no action against the company. *Faucher & The North Shore Ry Co.* Q. Judgment confirming, 5 February, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dissenting. Rep. 9 Leg. News 75.

Damages for arrest on a criminal charge on the ground that the magistrate who issued the warrant had no jurisdiction, the act complained of being out of his jurisdiction, that the complaint was malicious and without probable cause. *Held,* reversing the decision of the Court below that the absence of jurisdiction owing to error on the part of the magistrate does not of itself make him, or the complainant liable in damages, and that in this case there was no malice, and there was not absence of probable cause. *Copeland & Leclerc.* M. Judgment reversing, 25 January, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier & Cross, JJ. diss.

A married woman, authorized by her husband, can bring an action of damages in her own name for personal wrongs. *Dme Sarah Ann Waldon et vir. & Dme Maria White et vir.* Judgment confirming, 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby JJ.

A railway company employed a number of labourers to work at the construction of the line of road, and promised them transport to the place where they were to work. At a certain point the labourers were ordered to go on to a construction train. There were no carriages for their accommodation, but some trucks more or less encumbered with material. The greater number got on to a truck loaded with *lumber,* on which they were suffered to depart. Shortly afterwards a prop intended to keep the lumber in its place broke, and many of the labourers were precipitated to the ground and injured. *Held,* that the company was liable in damages. *The Canadian Pacific R. R. & Paquette.* M. Judgment confirming, 30 June, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Ross, Baby, JJ.

La compagnie intimée a laissé ouvert pendant la nuit le passage qui conduit de son quai et ponton à son bateau-passeur. Le mari de l'Appelante, croyant mettre le pied sur le bateau-passeur qui, étant en retard, ne se trouvait pas à son poste, s'est précipité dans le fleuve St. Laurent par l'ouverture restée ouverte à l'extrémité de ce passage, et s'est noyé. Delà action en dommage de la part de l'appelante qui a prétendu que ce passage aurait dû être fermé et le quai mieux éclairé. L'Intimée a plaidé qu'elle y avait placé le nombre de lumières exigées par les règlements de la cité de Québec.

Jugé:—1o. Que lors même que l'intimée se serait conformée aux règlements en question, cela ne l'a pas exempté d'observer les mesures, que la simple prudence commande, pour protéger la vie de ceux qu'elle appelle à

se servir moyennant rémunération de ce bateau-passeur, de jour et de nuit ;

2o. Que l'intimée s'est rendu coupable de négligence grossière. *Boulanger & The Grand Trunk R. R. Co.* Q. Judgment reversing, 5 October, 1885. Monk, Ramsay, Cross, Baby, JJ. Rep. 11 Q. L R. 254. 14 Rev. Leg. 321.

NOTA.—Tessier, J., présent à l'audition mais absent lorsque le jugement a été prononcé, a donné son concours au jugement.

Lorsqu'il est convenu qu'une partie donnera à l'autre partie une des trois sections de sa rade, pour l'occupation d'un navire appartenant à cette dernière, l'occupation de partie d'une autre section donne au locateur de telle rade le droit à une indemnité proportionnée à la perte qu'il a subie par suite de cet excédant d'occupation. *Allan et al. & Hall.* Q. Judgment confirming, 5 October, 1885. Monk, Ramsay, Cross, Baby, JJ. Rep. 14 Rev. Leg. 428.

Where there is a right of action for a trifling assault, and where no material damage is done, and the plaintiff refuses all settlement and begins and then abandons a prosecution before a magistrate, in order to bring an action of damages, the court will reduce damages which have no reasonable measure, to such a sum as would be imposed as a fine by a magistrate. *Papineau & Taber et al.* M. Judgment modified, 30 Dember, 1885. Monk. Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R. II. Q. B. 107.

An employer is liable for any want of care on his part by which his servant is injured; and, therefore, if he engages an unskilled or careless person to conduct his work, and owing to the want of skill or care of the person so employed, another workman is injured, the employer is responsible. But in order to hold the employer responsible, it must be clearly established that the negligence or want of skill of the fellow workman caused the accident by which the damage was occasioned. So, where

two workmen were engaged in an operation not shown to be hasardous, and an explosion occurred which killed the superior workman and injured the plaintiff who was assisting the other, it was held that the workman injured had no right of compensation from the employer, in the absence of any evidence as to the cause of the accident, or that the employer was in fault by having hired a careless or unskilful workman. *The St. Lawrance Sugar Refining Company & Campbell.* M. Judgment reversing, 21 March, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 290. 4 Dec. d'A. 186.

The defendants were constructing a building in the City of Montreal, and at their solicitation, men (of whom the plaintiff was one) were sent by the corporation to introduce water from the street by a pipe connecting with the building. This could not be done without working inside as well as ontside. A man passing along the wall, above where the Plaintiff was working at the pipe hole, loosened and started a brick in the wall, and the brick, falling down, injured the Plaintiff. A hammer had fallen previously and warning had been given to the men above.

Held:—That the burden of proof was on the Defendants to rebut the presumption of negligence, and this not having been done, the defendants were liable. *Evans & Monette.* M. Judgment confirming, 27 January, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ. Ramsay, Cross, JJ. dissenting. Rep. M. L. R. 2 Q. B. 243. 9 Leg. News 366.

Lorsqu'un chemin est en aussi bon état qu'il est possible de le maintenir, à raison de la saison et du voiturage qui s'y fait, et qu'il paraît même meilleur que les autres chemins, et meilleur qu'il n'avait été les années précédentes, la corporation ne sera pas responsable des dommages soufferts et causés par le mauvais état de ce chemin. *Beaucage & La Corp. de la Paroisse de Deschambault.* Q. Judgment confirming, 8 October, 1886. Sir A. A. Dorion,

C. J., Ramsay, Tessier, Cross, Baby, JJ. Sir A. A. Dorion, C. J., Ramsay, J. diss. Rep. 14 Rev. Leg. 655.

M., the husband of plaintiff, was employed by the defendant, master of a steamship, to assist in unmooring the steamship then lying at the wharf at Montreal, and about to put to sea. While M. was standing ready to cast off the stern hawser from the post at which it was fastened, the hawser snapped, and M. was fatally injured.

Held:—That the presumption was that the rope was insufficient for the purpose for which it was being used, or that the ship was unskilfully handled, and in either case, the master of the ship was responsible. *Corner & Byrd.* M. Judgment confirming, 27 January, 1886. Sir A. A. Dorion. C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay Cross, JJ., diss: Rep. 9, Leg. News 374.

An employer is responsible for injuries to his employees resulting from defects in the tackle, machinery or appliances provided for their use. Tackle used in work such as loading or unloading a vessel ought to be amply sufficient to withstand any strain that is likely to be put upon it by ordinary unskilled laborers; and where tackle breaks, without any extraordinary strain upon it, it will be presumed to be insufficient, though it may have been used previously for the same purpose without accident.

A laborer engaged in work such as loading or unloading a vessel is only bound to use ordinary care, and the employer is not relieved from responsibility by showing that if the laborer had used the greatest skill and care the accident might not have happened. *Ross & Langlois.* M. Judgment confirming, 21 Jannary, 1885, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R., I. Q. B. 280, 4 Dec., d'A. 187.

DEBENTURES.—The railway of an incorporated company may be sold in execution of a judgment in favour of a creditor suing on a debenture in a statuory form hypothecating the railway to secure the payment of the debenture. *The Corporation of the County of Drummond & The South Eastern Railway Company.* M. Judgment reversing, 20 Dec. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Tessier J. dis. Rep. 24 J. 276, 3 Leg. News 2.

A debenture of a Municipal Corporation in the hands of a *bona fide* holder, good on the face of it, and made within the limits of the powers of the Corporation cannot be questioned by the Corporation for irregularities in its issue.

An error in the date of such debenture is not a cause of nullity.

The power to issue debentures for $500 implies the power to make debentures of $100. *The Corporation of The Township of Roxton & The Eastern Townships Bank.* M. Judgment confirming, 28 November, 1882.

A debenture is a negotiable instrument, and cannot bear a condition on the face of it, making its validity dependent upon obligations to be performed in future. And so, where a municipal corporation voted a bonus to a railway company payable in debentures, and the by-law imposed certain future obligations upon the company as to the mode of operating the road, it was *held*, that debentures in which these obligations were set forth as conditions were not a valid tender. *MacFarlane & The Corporation of the Parish of St-Césaire.* M. Judgment reversing, 27 March, 1886. Monk, Ramsay, Tessier. Cross, Baby, JJ. Baby J. dissenting. Rep. M. L. R. II. Q. B. 160, 9 Leg. News 202.

Debentures are not money, and consequently damages for the failure to give debentures at the time agreed upon are not limited by the Art. 1077 C. C. which is as follows: The damages resulting from delay in the payment of money to which the debtor is liable consist only of interest at the rate legally agreed upon by the parties; or in the absence of such agreement at the rate fixed by

law. These damages are due without the creditor being obliged to prove any loss. They are due from the day of the default only, except in the cases where by law they are due from the nature of the obligation. This article does not affect the special rules applicable to bills of exchange and contracts of suretyship. *The Corporation of the County of Ottawa & The Montreal, Ottawa and Occidental Railway Co.* M. Judgment confirming, 27th November, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice and Cross dis.

Debenture alternative. v. PROCEDURE.

DECISORY OATH.—1247, 1248, 1249, 1250, 1251, 1252, 1253 C. C. 443, 444, 445, 446, 447 C. C. P. *v.* EVIDENCE.—POSSESSORY ACTION.

Declinatory exception. v. PROCEDURE.

DECRET.—Is the ordinance of a judge or court—decree, coloquially used for the sale under a *décret d'adjudication. v.* SALE.

DEED.—EVIDENCE OF FRAUD IN. *v. Fair & Dolan.* Rep. 2 Leg. News 395.

DEFAUT DE CONTENANCE.—*v.* SALE.

DEFENSE D'ALIENER.—The *défense d'aliéner* in a purely onerous contract is null. *Fraser et al. & Pouliot.* Q. Judgment confirming, 8 March 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Ramsay & Cross JJ. dis. they being of opinion that the contract was not purely onerous. Confirmed in Supreme Court, 12 Dec. 1879, 4 S. C. Rep. 515.

DELAISSEMENT.—In maritime law abandonment to the insurer,—otherwise abandonment to avoid personal responsibility on hypothecary action. *v.* ABANDONMENT.

An hypothecary or privileged creditor who buys in lands sold for taxes, and who within two years is re-imbursed by the owner, may while he remains in possession of the lands bring his hypothecary action against the owner, calling upon him to *delaisser* the lands, such creditor's possession being only *précaire* and not that of a proprietor as regards the real owner. *Corrigan & Ross.* Q. Judgment confirming, 5 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Delay when no time is fixed *v.* DEMEURE.

NOTE.—" Reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth. Inst. 566.

DELAYS OF PROCEDURE.—*v.* PROCEDURE.

DELEGATION.—Is perfect or imperfect, 1173 C. C. (1) Indication of payment, 1174 C. C. (2) A perfect delegation operates novation, 1172, 1175 C. C.

A simple indication of payment or the delegation of a new debtor, creates no *lien de droit* between him and the indicated creditor, so long as the latter has not accepted the party delegated.

The acceptance need not be express, except as regards third parties, but may be inferred from circumstances.

Registration by the parties is not equivalent to an acceptance of the delegation. *La Société Permanente de Construction Jacques-Cartier & Robinson.* M. Judgment confirming, 19 Nov. 1880. Sir A. A. Dorion, C. J., Monk, Cross, Baby, JJ. Rep. 1 Dec. d'A. 32. 4 Leg. News 38.

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(1) The delegation by which a debtor gives to his creditor a new debtor who obliges himself towards the creditor, does not affect novation unless it is evident that the creditor intends to discharge the debtor who makes the delegation.

(2) The simple indication by the debtor of a person who is to pay in his place or the simple indication by the creditor of a person who is to receive in his place, or the transfer of a debt with or without the acceptance of the debtor, does not affect novation.

Delegation until it is accepted does not bind the parties delegants, it only operates as an *indication de paiement*. *Reeves & Darling*. M. Judgment confirming, 19 Nov. 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

DELIBERE.—*v.* PROCEDURE.

DELIT.—*v.* DAMAGES.

DELIVERY TO CARRIER. — Delivery to a carrier for a purchaser, does not, under our system, prevent the purchaser from refusing to receive and pay for the goods. *Huston & Baile*. Q. Judgment reversing, 4 March, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, Plamondon, JJ.

DELIVERY. — *v.* COMMENCEMENT DE PREUVE PAR ÉCRIT.

DEMAND.—When an obligation fixes no place of payment, a demand should be made at the domicile of the debtor before suing, and if this be not done and the Defendant pays with his plea, he will not be liable for costs. *Godrique & Grondin*. M. Judgment confirming, 5 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Rev. Leg. 643.

An action was taken on a note *en brevet* payable on demand at defendant's house, without any previous demand. The defendant tendered the amount confessed judgment without interest or costs. *Held*, that, the tender was sufficient. *Dorion & Benoit*. M. Judgment reversing, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 171.

The demand of payment should be made by the creditor at the domicile of the debtor, in absence of any special stipulation. (1152) C. C.) (1) *Beaudry & Barbeau*. M. Judgment confirming, 15 February, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 1 Dec. d'A. 268.

DEMEURE.—Where no special time for the execution of an obligation is stipulated by the contract, a reasonable time is understood. But where no time is fixed for doing a certain thing and it is also stipulated that when that is done the party obliged to do it is to pay a certain sum of money, an action demanding absolutely the payment of the sum of money will not be maintained till the party is put *en demeure* to fulfil his obligation. *Beaudry & Les Marguillers de l'Œuvre et Fabrique de Montréal*, M. Judgment reversing 15 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 218.

There was a promise of sale to the effect that the price was $1200.00 of which $500.00 was acknowledged to have been received in cash at the passing of the agreement, and the balance of $700.00 was to be paid in seven equal annual instalments. The respondent was then a minor, but he was assisted, for the purposes of the agreement, by his father, who was present and who promised to procure a ratification of the agreement by his son when he should come of age. *Held* that the respondent, not being put *en demeure*, did not forfeit his right to obtain a deed of sale by his failure to make the yearly payments agreed upon, or by his failure to ratify. *Grange & McLennan*, M. Judgment confirming 27 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ. Sir A. A. Dorion, C. J., dissenting.

NOTE.—This case was appealed to the Supreme Court where it was held: Reversing the judgment of the Court below (Strong & Taschereau, JJ., dissenting,) that the condition precedent on which the promise of sale was made, not having been complied with within the time specified in the contract, the contract and the law placed

(1) Payment must be made in the place expressly or impliedly indicated by the obligation. If no place be so indicated the payment, when it is of a certain specified thing, must be made at the place where the thing was at the time of contracting the obligation. In all other cases payment must be made at the domicile of the debtor subject nevertheless to the rules provided under the title relating to particular contracts.

the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to lessor and lessee. 9 S. C. Rep. 385. But see arts. 1067-8-9 C. C. (1) *v.* REMÉRÉ.

DEMOLITION DE NOUVEL ŒUVRE.—The action *en démolition de nouvel œuvre* lies against the owner of land on a lower level of a stream, who has built a dam so as to obstruct the flow from a higher level, and thus weaken the power which has been previously used by the owner of the upper level to propel his machinery.

The fact that the work complained of has been completed does not effect the right of action for its demolition.

The Statute Consol. Stat. L. C., cap. 51, which provides that proprietors of lands may improve water courses adjoining them, and may erect dams, etc., but shall pay damages, to be ascertained by *experts*, which result from such works to others, does not apply to the case where the owner of the upper level already has works in operation, and does not deprive him of the action *en démolition*. *Fréchette & La Compagnie Manufacturière de St-Hyacinthe*, M. Judgment confirming 23 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dissented on the merits, but not on all the points noted above. He was of opinion that the act referred to merely transferred to the riparian proprietors the rights which had belonged to the Seignior and which had devolved to the crown. In the Privy Council the judgment was reversed on the merits. Rep. 5 Leg. News 187. 1 Dec. d'A. 378.

DEMOLITION.—*v.* MITOYEN WALL.

DEMURRAGE.—*v.* SHIPPING CASES.

DEMURRER.—An appeal may be allowed, in the discretion of the Court, when pleas are dismissed on demurrer. *Hall & Atkinson.*. Q. Judgment, 4 March 1875. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. *Harrisson & Damee du Sacré-Cœur.* M. Judgment, September 1875. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn JJ. *Pacaud & Nadeau.* Judgment, 7 Dec. 1875. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn JJ.

Leave to appeal will not generally be given from an interlocutory judgment dismissing a demurrer. *McGreevy & Normand.* Q. Judgment, 4 Dec. 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

The failure by a usufructuary to allege that she had made an inventory cannot be raised by demurrer to an hypothecary action brought by her against a *detenteur actuel* of property hypothecated for security of money subject to her enjoyment. Parties intervening as claiming the property subject to the usufruct cannot demur on this ground. *Nelson et al. & Harrison.* M. Judgment confirming, Sep. 1876. Dorion, C. J., Ramsay, Sanborn, Tessier JJ.

A party may demur to a portion of a plea; but if there be an allegation forming a good answer to the demand in the portion of the plea demurred to, the demurrer will be dismissed. *Reed & Beaudet et al.* Q. Judgment reversing, 4 Sep. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ.

A demurrer to the whole of a plea

(1) The debtor may be put in default either by the terms of the contract, when it contains a stipulation that the mere lapse of time for performing it shall have that effect, or by the sole operation of law, or by the commencement of a suit, or a demand which must be in writing unless the contract itself is verbal. 1067 C. C.

The debtor is also in default when the thing which he has obliged himself to give or to do could only have been given or done within a certain time, which he has allowed to expire. 1068 C. C.

In all contracts of a commercial nature in which the time of performance is fixed the debtor is put in default by the mere lapse of such time. 1069 C. C.

good in part, will be rejected. *Desrosiers & Hutchins.* M. Judgment reversing, 21 Sep. 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ.

An action to set aside a judgment on the ground of fraud without alleging any special grounds, will be dismissed on demurrer. *Barbin & Langlois.* Q. Judgment confirming, 8 Sep. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, McCord, JJ. *v.* PROCEDURE.

An action of damages, complaining that the respondent unlawfully tore down his fences in constructing a road, which was to be a front road of certain certain lots of land described in the declaration (such description not including the Appellant's lot), is not demurrable. *Whitman & The Corporation of Stanbridge.* M. Judgment reversing, 18 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 176. 1 Leg. News 475. 9 Rev. Leg. 652.

DEPLACEMENT.—*v.* Sale.

DEPOSITAIRE.—Where an auctioneer is made *dépositaire* of a sum of money, as security that the purchaser will take a title of a lot of land purchased by him at auction, the purchaser cannot sue the auctioneer to recover back the *depot*, without putting the principal *en cause*, and establishing that the failure to take the deed was owing to the fault of the vendor. *Murray & Arnton.* M. Judgment confirming, 21st December, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

DEPOSIT IN BANK.—Where monies have been deposited from time to time in a bank to the credit of A., of whom the Bank was creditor to an amount far exceeding the balance of such deposits, and on the understanding that such deposits were to enure to the benefit of the creditors of A. generally, B. and others cannot legally sue the bank to recover a proportion of such deposits, on the ground that a portion of said monies really belonged to B. and others, in the absence of any notice to, or knowledge by the bank of the existence of any such right on the part of B. and others, whilst such deposits were being made. *La Banque Jacques-Cartier & Giraldi.* M. Judgment reversing, 12 March, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 26 J. 116. Tessier, J. diss. Confirmed in Supreme Court. 9 S. C. Rep. 598.

DEPUTY PROTHONOTARY.—The Deputy Prothonotary may receive and homologate the advice of a family council convened for the purpose of authorising minors to accept a succession, and may give the requisite authorisation. *Cutting & Jordan.* M. Judgment confirming, February, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Belanger, JJ. Rep. 19 J. 139.

DESAVEU.—Attornies who have only continued the suit in order to secure their own costs, cannot be disavowed by the Plaintiff. See also *Montrait & Williams, p.* 178 *supra.* Ed. *Gagnon et vir. & Loranger et al.* M. Judgment confirming, 28 Nov., 1882. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ.

The *désaveu* by Defendant of the attorney of record who appeared for him does not stop execution, without an order of a judge. *Dawson & Macdonald et al.* Q. Judgment confirming, 5 Oct., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

NOTE.—There was another case between the same parties involving a question similar in principle—the only difference being that in the other case there was a second seizure.

DESISTEMENT.—"A party may, at any time before judgment, discontinue his suit or proceeding on payment of costs." 456 C. C. P.

"Discontinuance in appeal is effected in the same manner and under the same conditions as in the Superior Court." 1167 C. C. P.

Upon a *désistement* of the judgment without a tender of costs, the Court of Appeals will condemn the Respondent in the costs of both courts. *Bellay & Guay.* Q. Judgment, Dec., 1874. Do-

rion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 4 Q. L. R. 91.

DETENTEUR ACTUEL.—An hypothecary creditor has a right to an action *en déclaration d'hypothèque* against the *vendee* of the property hypothecated, even though such *vendee* may have re-sold the property if such sale be not registered.

Where the *vendee* proves a re-sale, not registered, and that he is no longer *détenteur* he will be condemned to costs up to plea filed.

The Plaintiff on proof of such plea may call in the person to whom the land is said to be re-sold and obtain judgment against him. *Lalonde & Lynch.* M. Judgment reversing, 18 February, 1875. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Ramsay, Sanborn, JJ., dis. Rep. 20 J. 158.

DISCHARGE. — The discharge of a debtor personally and hypothecarily liable for a debt does not discharge the hypothec. *Reford et al, & les ecclésiastiques du Séminaire de Montréal.* M. Judgment confirming, 24 Nov., 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dis. Rep. 4 Leg. News 27. 3 Dec. d'A. 1.

DILATORY PLEA.—The directors of a company incorporated under cap. 63 C. S. C. (1) may be sued with the company for a debt due to Plaintiff, if they have neglected to make the return required by the 13 Section of the 13 and 14 Vic. c. 28. (2) *The Hunterston Lumber Company & Ward.* Q. Judgment confirming 7 Sep. 1874. Monk, Taschereau, Ramsay, Sanborn, JJ. *v.* PROCEDURE.

DISCUSSION.—A party who becomes security for another, under the condition that he will not be responsible either for capital or interest, or for any costs whatever till after the discussion of certain advantages, cannot be called on to furnish the costs of such discussion beforehand. *Richard & Martel.* Q. Judgment reversing, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

DISSENTIENTS.—The School Commissioners representing the majority cannot after dissent collect taxes from the dissentients for school purposes. *Duncan & The School Commissioners of St. Germain in Grantham.* Q. Judgment reversing, 5 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Verbal testimony is admissible to prove the status of a dissentient, and that a dissentient status had existed *de facto. School Commissioners of the Municipality of the Township of Roxton and Boston et al.* M. Judgment confirming, 17 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 122, 3 Leg. News 20. *See Enquête.*

DISTRIBUTION.—*v.* INSOLVENT ACT. *Craig & Hagan.* M. Judgment confirming, 22 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. *v.* PROCEDURE, Report of.

DISTRICT MAGISTRATES were established by the act 32 Vict., c. 23. *v.* MUNICIPAL CODE

DITCH.—A boundary ditch between two proprietors (*fossé de ligne*) is not a water-course in the sense of article 867 (1) and following articles of the Municipal Code. Such articles are provided for by article 420 and following articles of the M. Code. (2)

(1) General Joint Stock Co.'s Act.

(2) With regard to the reports of directors.

(1) All water courses draining several pieces of land, with the exception of boundary ditches which drain only the two properties between which they are situated, and of road ditches are regulated according to the provisions of this title.

(2) The road inspector, upon the written or verbal application of any owner or occupant who demands the opening up of a boundary ditch between his land and that of his neighbor, must visit the locality of the proposed boundary ditch, where after an examination of the place, and a hearing of the parties interested who have received three days special notice thereof, he orders the performance of any work he deems necessary and determines how and by whom they must be executed.

Dastous & Nolan. Q. Judgment confirming, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

DIVISION OF DEBT.—The prohibition of the second alinea of Art. 15 C. C. P., does not prohibit the division of a debt but prohibits its division for the purpose of suing for the several portion of it by different actions. *Têtu & Garneau et al.* Judgment reversing, 5 June, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Sanborn, J., dis. Rep. 1. Q. L. R. 355,

DOMICILE.—The parties were married in the State of New-York, without antenuptial contract, and their matrimonial domicile was in that State, but the husband afterwards changed his domicile to the province of Quebec. After this change of domicile the wife obtained a divorce in the Supreme Court of New York State, the husband appearing in the suit, and not contesting. *Held,* (reversing judgment of Torrance, J.,) that divorce not being recognized by the law of the Province of Quebec, which was the domicile of husband and wife, the decree obtained by the latter in New York had no binding effect in Quebec, and notwithstanding such decree the parties were still husband and wife; and therefore, the wife could not bring an action against her husband for an account without being authorized. *Fisk & Stevens.* M. Judgment reversing, 19 Sep., 1883. Rep. 6 Leg. News, 329. Reversed in the Supreme Court. S. C. Rep.

DONATION.—Mathewson the elder was a partner of Geo. Childs & Co. The accounts being made up when M. was about to withdraw from the firm, $29,000 stood to the credit of M. He was desirous that his son should enter the firm of G. C. & Co., and he gave him, or purported to give him his share in the business of Geo. C. & Co. There was a condition that M. the son was to pay M. the father 7 per cent on $29,000. Later a relative Paton, was admitted partner in Geo. C. & Co.'s business, he agreeing to pay half the interest.

M. the elder then entered the firm of Smyth & Edmunson, which shortly after became insolvent. The assignee of S. & E. then claimed the $29,000 in the hands of G. C. & Co., as being the property of M. the elder, or at all events the annuity, equal to interest reserved by M. the elder. The Court below *held,* the assignee was entitled to neither, and this judgment was confirmed in appeal. *Brown & Mathewson.* M. Judgment confirming, Sep., 1875. Taschereau, Ramsay, Sanborn, Loranger, Bélanger, JJ. Ramsay, J. dis., was of opinion that the whole transaction was simulated, that it was only a loan of the money to M. the younger, and later to his relative Paton, as the whole circumstances showed (stipulation of interest and subsequent change to Paton of one half on the same conditions as to the son, and abandonment by the son, strange if it was a gift originally to the son) and that in any case the creditors of the insolvent M. the elder were entitled to the interest he had reserved.

A testament which ratifies a donation *entre vifs,* ratifies it as a donation, and the testament adds nothing to the donation. *Morency & Morency.* Q. Judgment confirming, 5 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 8. Rev. Leg. 634.

Under the law existing prior to the promulgation of the code, a donation could not be revoked *pour cause de survenance d'enfants* unless the donation was of a notable portion of the fortune of the donor.

The wealth of the donor and the position of the parties will be considered in deciding the question. *Cuvillier et al., & Symes et al.* M. Judgment reversing, 22 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Sir A. A. Dorion, C. J. & Cross, J. dis. 1 Leg. News 30. Confirmed in Privy Council.

A donor who registers his deed of donation preserves his hypothec for all charges appreciable in money stipulated in his favour, without it being

necessary to fix by the deed, the value of these charges. And that a donation gives the same hypothec towards a third party, in whose favour the charges are stipulated. *Dufresne & Dubord.* Q. Judgment confirming, 7 Dec. 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier Cross, JJ. Rep. 4 Q. L. R. 59. 1 Leg. News 42.

Le donataire dans une donation, même gratuite, faite par un ascendant à son héritier présomptif n'est qu'un ayant cause à titre particulier et qu'il peut invoquer à l'encontre d'une action petitoire des moyens d'exception, dont ne pourrait se prévaloir le donateur lui-même. *Lucien Lemien, fils de Moise & Labonté.* M. Judgment reversing, 16 Dec. 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, J. dis. Rep. 2 Dec. d'A. 94.

The gift of immoveable property by a father to his daughter and his son-in-law jointly is deemed to be a gift to the daughter alone Art. 1276 C. C. (1) And so where a judgment against the son-in-law is registered against the property so given there is no hypothec, the title not being in the son. *The St Ann Mutual Boy So. & Watson et al.* M. Judgment reversing, 28 Nov. 1882. Monk, Ramsay, Tessier, Cross, Baby JJ.

A property may become a public street by the destination of the proprietor, and by public use. This destination may be inferred from deeds passed by the proprietor, by his allowing the land to be used as a street, and by his suffering the municipal authorities to make public works on it. *Guy et al. & The City of Montreal.* M. Judgment confirming, 24 Nov. 1880. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Doherty JJ. Rep. 1 Dec. d'A. 51, 3 Leg. News 402.

(1) Gifts by contract of marriage, those which are in contemplation of death included, gifts during marriage, and legacies made by the ascendants of one of the consorts, either to the consort entitled to inherit from them or to the other, are deemed as regards immoveables, unless there is an express declaration to the contrary, to be made to the consort entitled to inherit and are his private property as being acquired under a title equivalent to succession. The same rule applies even when the gift or the legacy in its terms is made to both consorts jointly. All gifts and legacies thus made to both consorts jointly, or to one of them by others than ascendants, come under the contrary rule and fall into the community, unless they have been expressly excluded.

DONATION OF MOVEABLES.—*v.* MARRIAGE CONTRACT.

DONATION ENTRE EPOUX.—*v. Pilon et al., & Mallette.*

DONATION.—*v.* THOROUGHFARE.

DON MANUEL.—A sum of money given by a mother to her daughter at the time of her marriage, in addition to the *dot* stipulated by the marriage contract will be presumed to be a gift, and not a payment in advance of money due to the daughter from her mother's estate, payable at the mother's death. *de Montenach et al. & de Montenach et vir.* M. Judgment confirming, 22 Dec., 1874. Dorion, C. J., Monk, Ramsay, Sanborn, Sicotte, JJ. Rep. 19 J. p. 94.

DOWER.—"There are two kinds of dower; that of the wife and that of the children.—These dowers are either legal or customary, or prefixed or conventional." C. C. 1426. Legal or customary dower is that which the law independently of any agreement and as resulting from the mere act of marriage establishes upon the property of the husband in favor of the wife as usufructuary and of the children as owners. 1427 C. C. Prefixed or conventional, (1) 1428 C. C.

Douaire coutumier created by a marriage contract, entered into before the coming into force of the registry ordinance, does not require to be registered. *Leroux & Leroux.* M. Judgment reversing, 22 Dec. 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 20 J. 224.

(1) Prefix or conventional dower is that which the parties have agreed upon by the contract of marriage.

Customary Dower, Law governing—Renunciation by wife of dower—Stipulation for the benefit of a third person.

The right of dower is regulated by the law of the place where the immoveable is situate, and therefore accrues to the wife on an immoveable in the Province of Quebec, although the consorts may have been domiciled, at the time of the marriage, in England, by the laws of which dower would not accrue.

Where the wife agrees to renounce her right to dower on property for a valuable consideration received by her, such renunciation is binding on her, though not made expressly in the form prescribed by the C.C. 1444. (1) *Ericksen et al., & Cuvillier et al.* M. Judgment confirming, 19 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 285.

A husband may execute a valid hypothec in favor of his wife on his immoveable property, in lieu of a hypothec which she had by her contract of marriage, to secure a sum of money brought by her at the marriage and reserved as *propre* by her contract of marriage.

A married woman may validly renounce her priority of hypothec in favor of a third person lending money to her husband on the security of his real estate.

(1) The wife who is of age may however renounce her right of dower, whether customary or conventional, upon such immoveables as her husband sells, alienates or hypothecates the immoveable or by a separate and subsequent act.

Such renunciation in favour of a third person does not deprive the wife of her rights against other mortgage creditors inferior in rank to herself. *La Société de Construction Montarville & Cousineau et vir.* M. Judgment confirming, 3 Feb., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 329.

Heirs joined in a deed of sale of an immoveable pertaining to the succession of their father. They afterwards claimed customary dower on an immovable which had been disposed of by their father during his lifetime, without the wife having renounced her dower thereon. *Held*, that this immoveable would have been subject to dower if the heirs had renounced the succession, but the fact that the heirs joined in the deed of sale first mentioned was equivalent to a declaration of their acceptance of the succession, and excluded their right to customary dower. *Bétournay & Moquin.* M. Judgment reversing, 19 Jan. 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 5 Leg. News 327, 2 Dec. d'A. 187.

DRAIN.—The vendor is warrantor that the drains of the property sold, and which are concealed from view, are made according to the By-Laws of the municipal corporation within which the property sold is situated, and existing at the time when the house sold was erected. *Ibbotson & Ouimet.* M. Judgment reversing, 21 Dec. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 53.

DROIT DE RETENTION.—*v.* MATTE & LAROCHE.

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EDIT DE SECONDES NOCES. — *v.* COMMUNAUTÉ.

EDUCATIONAL INSTITUTION. — A school for the education of young ladies kept by a private individual and not under public control, is not an "educational institution" within the exemption of 41 Vict., (Q.), C. 6, S. 26. (1) *Wylie & vir. & Cité de Montréal.* M. Judgment confirming, 24 March, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J. dissenting. Rep. M. L. R. I. Q. B. 367, 4 Dec. d'A. 245.

ELECTION CASES.—The prohibition of Custom House officers to vote at elections by the act 20 Vic., c. 22, S. 3 (1857) continued by B. N. A. Act., S. 41 and 84., does not prevent them from voting at elections for local members. *Hamilton & Beauchesne.* Q. Judgment confirming, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Under the provisions of the 23 Vic., c. 17, the costs of an election feast, after the election was over, are not recoverable. *Guevremont & Tunstall & al.* M. Judgment confirming, 22 Leg. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay et Tessier, JJ. dissent from this motive of the judgment, but concurred in the judgment as there was not legal evidence to support the action.

Under the Dominion controverted Elections Act of 1874, (37 Vic. c. 10) there is no appeal from an order given in chambers by a judge of the Superior Court permitting a candidate at a federal election to examine the ballots. *Mackenzie & White.* M. Judgment dismissing appeal, 20 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 7 Rev. Leg. 218.

No appeal lies to the Court of Queen's Bench from a judgment of the Superior Court on an election petition under the Dominion Controverted Elections Act of 1874, 37 Vic., c. 10.

The Dominion Parliament had a legal right to impose on the Superior Court and the judges thereof the duty of trying controverted elections of members elected to the House of Commons of Canada. *Bruneau & al & Massue.* M. Judgment rejecting appeal, 18 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J., 60, 2 Leg. News 38, 9 Rev. Leg. 626.

Section 100 of the Dominion Controverted Elections Act of 1874, (37 Vic. c. 18) does not preclude the recovery of accounts for lawful expenses connected with an election, unless the expenses were incurred with a corrupt or illegal motive. *Workman & The Montreal Herald Printing & Publishing Co.* M. Judgment confirming, 18 Sep., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Ramsay, J. dis. Rep. 21 J. 268, 9 Rev. Leg. 305.

Influence, Menaces.—A menace to be intimidation and to be classed as undue influence, under 37 Vic., c. 10, must be of a serious character, of an evil that has something real and substantial in it, and not only idle and trivial words. *McKenzie & Turgeon.* Q. Judgment reversing, 5 Oct., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 335.

(1) Section 77 of chapter 15 of the Consolidated Statutes for Lower Canada is amended by adding after sub-section 2 the following provision :—

"3. Every educational institution receiving no grant from the corporation or municipality on which they are situated and the land on which they are erected and its dependencies, shall be exempt from municipal and school taxes, whatever may be the act or charter under which such taxes are imposed, notwithstanding all provisions to the contrary."

In penal actions, such as that instituted under section 134 of the Electoral Act of Quebec, (38 Vic., c. 7) making false declarations as to qualification, the evidence must be considered under the strictest rules, on the principle *que la fraude ne se présume pas. Neault & St-Cyr.* Q. Judgment confirming, 5 June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborh, Tessier, JJ. Rep. 3 Q. L. R. 147.

Under the Quebec Election Act (1875) (38 Vic., c. 7) the mere fact that a voter being in the county of Berthier, was engaged to seek a cart load of effects in Montreal, that he went on the polling day and did not vote, and that he did not bring back the load he was sent for is sufficient to raise a presumption that the person employing him was guilty of a corrupt practice under the said act. *Lapierre & Laviolette.* Judgment confirming, 27 September, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice dissenting *held* there was no sufficient evidence of the accusation. Ramsay, J. dissenting thought the action did not show which of the corrupt practices indicated by the Statute was complained of. The evidence dit not show any corrupt bargain but the reverse. The action was therefore under the fifth subsection. That there was no evidence of intention because an innocent act standing alone cannot be evidence of a corrupt intention. Rep. 6 Leg. News 415, 3 Dec. d'A. 6.

The holding of an election under 38 Vic., c. 7, Q. is matter of record, and in an action for a penalty, it must be proved by the written certificate of the returning officer.

Suspicions are not to take the place of proof in prosecutions for electoral frauds. The corrupt inducement to vote or to refrain from voting must be clearly proved. *Hébert & Choquette.* Judgment reversing, 7 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 6 Leg. News 414.

Lorsque dans une action pénale d'après l'acte électoral fédéral tel qu'amendé par 46 Vict., ch. 4, S. I., un demandeur par une seule et même action demande le recouvrement de plusieurs pénalités ou amendes, il doit faire, avec son *præcipe*, un dépôt de $50 pour chacune des dites pénalités dont il demande le recouvrement. *Choquette & Hébert.* Q. Judgment reversing, 7 May 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Baby, J. dissenting. Rep. 7 Leg. News, 178, 10 Q. L. R. 192.

Appellant was sued for the penalty for personating an elector under the 3[illegible] Vic., c. 7, sect. 210, (Q). The declaration set forth that the Plaintiff demanded a ballot-paper. No amendment was asked for and the judge in first instance dismissed the action. In review this judgment was reversed "*considérant que d'après la section* 293 *du susdit acte, il suffisait que le demandeur allégua dans sa déclaration, que le défendeur lui devait la somme de cinq cents piastres, que l'acte de supposition de personne avait été commis*" and in appeal the judgment in review was affirmed. *Laberge & Gagné.* Q. Judgment confirming, 8 February, 1884. Sir A. A. Dorion, C. J. Monk, Ramsay, Tessier, Baby, JJ. Ramsay, J. dissenting, thought the declaration defective, that there were no words to cover the allegation that it was the Plaintiff that personated and not the Defendant, that the error was amendable, that no motion to amend had been made, that the judge had not amended, neither had the court of review, and that the court of appeal had no power to amend a material fact. In addition to this there was no evidence as to who was returning officer. Verbal evidence that he was returning officer is sufficient, but that evidence must be given. (Sect. 295) The admission of the Defendant relied on to make up this is insufficient, as he does not specify to what election he alludes.

Dans une action, sous l'acte des Elections Fédérales de 1874, en recouvrement de pénalités pour corruption de voteurs à une élection sous cette loi, la preuve que les personnes accusées

d'avoir été corrompues avaient la qualité d'électeurs ne peut être faite que par la production au dossier de la liste électorale en force dans la circonscription électorale où l'élection a eu lieu, et la preuve testimoniale ne saurait y suppléer.

Dans l'espèce, la preuve qui doit constater la nature de l'élection et les noms des candidats électoraux est aussi essentielle. *Filiatrault et Prieur.* M. Judgment confirming, 21 January, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 4 Dec. d'A. 306.

ELECTION.— *v.* SCHOOL COMMISSIGNER.

ELECTORAL LISTS. — *v.* MUNICIPAL CASES.

EMPHYTEUSIS. — Emphyteusis, or emphyteutic lease, is a contract by which the proprietor of an immoveable conveys it for a time to another, the lessee subjecting himself to make improvements, to pay the lessor an annual rent, and to such other charges as may be agreed upon. Art. 567 C. C.

The lease of a mill for twelve years with the obligation of the lessee to erect certain buildings on the land leased, and to pay an annual rent is an ordinary lease subject to the jurisdiction of the lessor and lessees act. *Marett & Robitaille.* Q. Judgment reversing, 8 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 420.

Under an emphyteutic lease, the lessor has not, for the payment of the rent and other obligations of the lease, the privilege which he has in an ordinary lease on the moveable property found in, or removed from the premises leased. *Alliott & The Eastern Township Bank.* M. Judgment reversing, 19 Jan., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 172.

ENQUETE. — The regular mode of taking evidence, unless there be a consent in writing, is in presence of a judge. And a party can refuse to proceed where there is no judge. And if Defendant be summoned to appear where there is no judge and he does not appear he will not be held to be in contempt, if it be established that he knew there was no judge in the district, and therefore did not obey the *subpœna.* Nor will be he charged with the costs of the day. And leave to appeal will not be granted from a judgment so deciding. *Pacaud & Poisson,* Q. Judgment 6 Dec., 1873. Duval, C. J., Badgley, Monk, Taschereau, Ramsay, JJ.

It is only by consent that a party in a contested suit can proceed to take evidence at length, and either party has a right to insist that the case be proceeded with at *enquête and merits. The Exchange Bank & Craig,* M. Judgment refusing leave to appeal 27 March, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J., dis. Rep. 7 Leg. News 390.

An *enquête* will be ordered in appeal to enable respondent to prove acquiescence in a judgment. *Jordan & Jetté,* M. Judgment September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a petition has been filed praying the dismissal of an appeal on the ground of *acquiescement,* and affidavits are filed in support and against the application of a contradictory character, leave will be granted to cross-examine the deponents. *Hotte & Champagne,* M Judgment 19 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 25 J. 227, 2 Dec. d'A. 127.

Where in an action of damages for libel, the plea, being in mitigation, is vague, the Defendant will not be given leave to re-open his *enquête* to examine witnesses not named, and whose evidence is described as "*tendant à prouver la vérité de tous les faits allégués dans l'article incriminé en cette cause à peu de choses près, etc.*" *Irvine & Tousignant,* Q. Judgment refusing leave to appeal 4 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

ERROR.—Error is a cause of nullity in contracts, subject to the rules and limitations of the Civil Code. C. C. 991.

Error is a cause of nullity only when it occurs in the nature of the contract itself, or in the substance of the thing which is the object of the contract, or in something which is a principal consideration for making it. C. C. 992.

And so Letters Patent issued in error as to important facts will be set aside. *Regina & Normand & al.*, Q. Judgment reversing 8 Sep., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Letters patent granted by the crown according to an individual, the rights to gold mines on certain property in his seigniory, will not be set aside as being granted in ignorance of facts, if it appears that gold had been already found in small quantities, such as *or en paillote*. *Regina & Couillard & al*, Q. Judgment confirming 7 Dec., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 6 Leg. News 402.

And it is immaterial that the contract was made by an agent who suppressed the material fact which was within his knowledge, although his principal was ignorant of the fact suppressed.

And where shares were sold, purporting to be shares of an incorporated company, when, in fact, no such corporation was in existence, the error into which the purchaser was led was sufficient to annul the contract. *Chretien & Crowley*. M. Judgment confirming 19 Jan., 1882. Rep. 5 Leg. News 2 62. 2 Dec. d'A. 385.

A policy of Insurance may be set aside for error. *Brodie & The Ætna Life Insurance Company*, M. Judgment 16 June, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 20 J. 286, 8 Rev. Leg. 91.

A receipt may be set aside for error. *Price & al., & Mercier*, Q. Judgment 7 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. *Ste Marie & Ste Marie*, M. Judgment confirming 15 June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

An action will lie to correct an error in the description of real estate in a contract. *Ward & Hayden*, Q. Judgment confirming 3 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

An action was instituted for the delivery to Plaintiff of an immovable sold to him, and paid for by him. The Defendant pleaded that the sale was for £120 and not for $120 as the deed purports it was, and she asks to have the deed set aside. The error as to the amount of the purchase money was not proved. The Superior Court maintained the action. In Review that judgment was reversed the Court holding.

"Seeing that the property described in the Plaintiff's declaration, and which the Plaintiff alleges that he purchased from his mother in-law, the Defendant for one hundred and twenty dollars, was at the date of the alleged purchase, worth at least eight hundred dollars, and had been insured for that sum, which was more than six times as much as the Plaintiff agreed to pay for it."

"Seeing that at the date of the said purchase, the Defendant who is about seventy years of age was in affliction caused by the death a few days before of her daughter, who had been living with her, and that the said Defendant at the period aforesaid, appears moreover to have been under the influence of unfounded apprehensions as to proceedings that might be taken against her, by the husband of her daughter who had recently died."

"Considering that the Plaintiff as the husband of the Defendant's surviving daughter, was the person to whom, under the circumstances already mentioned, the Defendant had a right to look for advice and assistance."

"Considering that the said deed of sale shows plainly great weakness on

the part of the Defendant the seller, and advantage taken of that weakness by her son-in-law the purchaser, the said contract of sale being such, as no man in his senses, and not under a delusion, would make on the one hand, and as no honest and fair man would accept on the other."

This judgment was confirmed in Appeal 8 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis. *Fair & Doolan*, 2 Leg. News 395.

In a commercial matter it may be proved by parol testimony that a receipt was given by error. *Price et al. & Mercier*. Q. Judgment, 7 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ., Ramsay, J., admitting the principle, dissented from the judgment on the insufficiency of the testimony offered.

Parol testimony will be received to prove error in a receipt. *Ste. Marie & Ste. Marie*. M. Judgment confirming, 15 June, 1877, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Verbal testimony is admissible to prove error as to the *status* of a person. *Charette & Robert*. M. Judgment, 27 September, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., See Dissentient. Evidence of status.

Appellant purchased from one Connolly, 4 June, 1878, certain immovable property Connolly had purchased from Respondent, and for the whole price of which Respondent had given Connolly a discharge in writing. Appellant registered his title on the 14 June, 1878. In February 1879, Dubuc sued Connolly for the balance of the price. Connolly pleaded payment, and produced his receipt. This receipt was set aside as having been given error. *Held* by this Court: 1o. That the judgment rendered in the suit between Connolly and Dubuc did not affect Kidston; 2o. That Kidston could not be damnified by the error of Connolly in giving the receipt, on the faith of which he had paid Connolly the purchase money. *Kidston & Dubuc*. Q. Judgment reversing, 7 May, 1878. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, Baby, JJ., dis.

NOTE.—The jurisconsults of the Supreme Court reversed this decision; but why they have not yet disclosed.

Although the Appellant had, in error, subscribed for a larger number of shares than he intended, in the capital stock of the company Respondent, and had sought ineffectually to be relieved immediately after, yet the facts that he allowed nearly two years to pass before taking legal action to have the contract annulled, and only took such action when calls were made to cover losses, and had in the meantime accepted a dividend of ten per cent on his shares, constituted an acquiescence sufficient to render him liable for the whole amount subscribed.

Where the law declares consent to be of the essence of a contract, it does not refer to the consent of the mind, but to the declaration of consent. *Côté & Stadacona Insurance Co.* Judgment confirming, March, 1889. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep 6 Q. L. R. 147, 10 Rev. Leg. 289. Reversed in Supreme Court, 6 S. C. Rep. 193.

Error of law is not a cause for annulling a transaction; but to be a valid transaction the parties must have expressly referred to and covered the question of law between them. Arts. 1921 & 1922 C. C. (1) *Doutney & Richard et al.* M. Judgment confirming, March 1879. Sir A. A. Dorion, C. J. Monk. Ramsay, Tessier, Crose, JJ.

A promissory note given without value and for a consideration erroneously

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(1) Error of law is not a cause for annulling transaction. With this exception it may be annulled for the same causes as contracts generally, subject nevertheless to the provisions of the articles following. 1921 C. C.

Transaction may also be annulled when it is made in execution of a title which is null, unless the parties have expressly referred to and covered the nullity. 1922 C. C.

believed to be good in law is not valid. *Reel & McEnven.* M. Judgment reversing, 29 Sept., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Un reçu pour balance du prix de bois vendu constate un règlement final, qui ne peut être mis de côté, sans alleguer l'erreur ou d'autres causes de nullité. *Johnston & McGreevey.* Q. Judgment confirming, 9 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec., d'A. 299.

A commercial agent who has settled with his employers for the amount of the commissions to which he is entitled will not be allowed to disturb the settlement except on clear evidence of error or fraud. *Ames et al. & Fuller.* M. Judgment reversing, 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Tessier J. dis.

The receipt of the Sheriff aknowledging having received money will not be set aside as given in error without a *commencement de preuve par écrit*, on the sole evidence of the officer who gave the receipt, where the amount acknowledged to have been received is the amount which the party paying it owed, and ought to have paid. Nor will this be affected by the question arising on an *inscription en faux* by the Sheriff denying having received the amount. *Lariviere & La Corporation de Québec.* Q. Judgment reserving, 3 Oct. 1883. Sir A. A. Dorion C. J., Ramsay, Tessier, Cross, Baby JJ. Tessier J. dis.

It is for the party setting up error in a receipt to prove it. So where a receipt was given for "*toute réclamation*" it covers a note held by Plaintiff, unless it be explained otherwise. *Hart & Boudreault.* Q. Judgment confirming, 4 Sept. 1879. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ.

In the contract of sale, the value of the object sold is an accidental quality, and consequently error as to the value on the part of the purchaser is not ground for annulling the sale. *Rosenheim & Martin.* M. Judgment confirming, 15 Sept. 1874. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Rev. Leg. 258.

A clerical error in a pleading may be amended without giving rise to a right to re-plead. *Barbin & Langlois.* Q. Judgment confirming, 8 March, 1879. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ.

A clerical error in the certificate of the Prothonotary, establishing that an action was not returned on the return day, will not prevent the Defendant having *congé-défaut*, if the identity of the action and the fact of its not having been duly returned are sufficiently proved. *Filiatrault & Brunet.* M. Judgment confirming, Dec. 1878. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ.

Where by error the Defendants were condemned jointly and severally, the Court will not amend the judgment, for it is a question of law whether the condemnation should be joint or joint and several. The remedy is by Appeal. *The Exchange Bank & Lord et al.* M. Judgment refusing motion. 17 Dec. 1883. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. *See* EVIDENCE.

Where in the court below the action had been dismissed without costs of enquete, and in review the action was maintained, and in appeal the action was again dismissed, but without mention of costs—*Held* to be an error, the intention being to restore the first judgment and would be corrected. *McGibbon & Bedard,* M. Judgment rectify error, Nov. 20, 1887. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, Ramsay, J. dis.

ESTIMATES.—*v.* CONTRACTS, CONTRACTORS.

Progress estimates of work done under contract will, if uncontradicted, form sufficient evidence to support an action for the price of work.

If a contractor agrees to finish his contract work within a specified time, and fails to do so owing to the fault of

the principal with whom he has contracted the failure to fulfill the contract cannot be set off against him on an action for the price of the work he has performed. *McGreevy & Boomer et al.* Q. Judgment confirming, 7 June 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Dorion, C. J. dis. Rep. 9 Rev. Lég. 587.

EVIDENCE.

Proof is made :
(1) By writings which are :
(*a*) Authentic, C. C. 1202) or
(*b*) Private, (C. C. 1221).
(2) By testimony, *i. e.* of witnesses, (C. C. 1230)
(3) By presumptions, (C. C. 1238).
(4) By admissions which are either,
(*a*) Judicial or
(*b*) Extra judicial, (C. C. 1243.)
Judicial admissions are obtained by
(*a*) The oaths of parties examined as witnesses,
(*b*) The decisory oath, and
(*c*) The oath put officially.
Who may be a witness, C. C. 1231, 1232.

It seems however that when a person is *garant* of one of the parties, and also responsible for the action, although not nominally a party to it, he cannot be examined as a witness in favour of the party representing his interest. *Daunot & Aubert.* Q. Judgment confirming, 7 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 J. 295, 10 Rev. Leg. 576.

The endorser of a promissory note may be examined as a witness in a suit against the makers by a subsequent holder, provided it does not appear that the suit is really that of the endorser. *McLeod & The Eastern Township Bank.* M. Judgment confirming, 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 239.

And where by a simulated deed a claim is transferred to a nominal Plaintiff, the real plaintiff cannot be a witness to establish the claim. *Bernier & McGreevey.* Q. Judgment confirming, 6 Feb., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A widow had a direct interest in a suit regarding her late husband's estate but was not a party to the suit, which was between the executors, intervening, and a third party. She was examined as a witness. The court declined to express any opinion as to her competence to be a witness, as with her evidence there was not sufficient to reverse. *Cruice & al & Darmody.* M. Judgment confirming, December, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

Is a party *es-qualité* a competent witness ? *Jaquay & Hagar.* 1 Fitts.

Where an assignee to the estate of an insolvent brings an action in his quality as such assignee *held*, following *Battersby & the City of Montreal* and reversing the judgment of the Superior Court, that he can be examined on behalf of the parties he represents. *Fair & Cassels*, 2 Q.B.R. 1, Q.B., 1881 (1).

A tutor suing *es-qualité* may be a witness in the suit for his pupil. See opinion of Casault J., 7 Q. L. R. 59. It was not necessary to decide the point, the proceeding by the tutor not being established with his evidence ; but the court did not question the ruling of the Superior Court on the point. *Pelletier & Thompson et al.* Q. Judgment confirming, 3 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

In what case is testimony admissible? C. C. 1233.

The engagement by a railway company of a civil engineer, for carrying out the construction of the railway, is a commercial matter, and may therefore be proved by verbal testimony ; and any modification of the original agreement may be proved in the same way.

(1) See also as to the competency of the parties represented. *Forget & Senécal*, 4 L.N., 85.

As a matter of fact it is time these absurd restrictions as to the competency of witnesses were abolished. Ed.

Where a salary is payable in bonds to be taken at 50 per cent of their nominal value, a tender of three bonds, equal of $1,500 for value, is not a legal tender of the sum of $619.50, or $1,239 in debentures, if the party tendering attaches the condition that the difference of $261 shall be returned to him in money. *Legge et al., & The Laurentian Railway Company.* M. Judgment reversing, 17 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 98. 3 Leg. News 23.

In a commercial matter it may be proved by parol testimony that a receipt was given by error. *Price et al., & Mercier.* Q. Judgment, 2 Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Ramsay, J., admitting the principle, dissented from the judgment on the insufficiency of the testimony offered.

Parol testimony is admissible to establish error in a receipt. *The Ætna Life Insurance Co. & Brodie.* M. Judgment reversing, 16 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 20 J. 286. 8 Rev. Leg. 91.

Parol testimony will be received to prove error in a receipt. *Ste Marie & Ste Marie.* M. Judgment confirming, 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The respondent sued the Appellants for an alleged overpaid amount of $135.38, his pretention being that he had paid the Appellants a sum of $1,300 instead of that of $1144.62 which he owed them. He filed in court several receipts amounting in all to $1,300.

The Appellants had sufficiently established that on the 18th June, 1877 when they gave a receipt to respondent for $509, they only received a sum of $300, and, that this receipt included a previous payment of $200 made by one Rutherford on Respondent's account, consequently it was Respondent who still owed a balance to Appellants. *Kneen et al. & Boon.* M. Judgment reversing, 25 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Dec. d'A. 55.

Verbal testimony is admissible to prove error as to the *status* of a person. *Charette & Robert.* M. Judgment, 27 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

That in a suit between rate payers and school commissioners, the fact that the rate payers are dissentients and the organisation of a corporation of dissentient school trustrees may be proved by verbal testimony, where it is evident by receipts for school taxes granted by such dissentient corporation in favor of said rate payers, during a series of years, and by other circumstances, that such a corporation has *de facto* existed, and claimed payment of school taxes in that capacity during many years. *The School Commissioners of the Township of Roxton and Boston et al.* M. Judgment confirming, 17 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. 24 J. 122. 3 Leg. News 20.

A writing is not required to establish that property has been abandoned to the public for use as a public street; but the acts from which a dedication or abandonment can be inferred must be of a totally unequivocal character.

The fact that a street was openly used by the public without dispute for upward of ten years as a highway, and that the corporation of the city exercised visible ownership by constructing a sidewalk thereon, and filling in a swamp, more than ten years before the institution of an action, is sufficient proof of dedication by the proprietor. *Guy & The City of Montreal.* M. Judgment confirming, 24 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Doherty, JJ. 3 Leg. News 402. 1 Dec. de la Cour d'Appel 51.

When it appears by the evidence that at the place where a marriage was alleged to have been celebrated, there were no regular and authentic registers kept, and that no certificate could be obtained, proof of the marriage may be made by witnesses.

And where a person was drowned in a remote part of the county where no registers were kept proof of the death may be made by witnesses. *Catling & Jordan*, M. Judgment confirming 4 Febr., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 401.

Commencement de preuve par écrit.—Interrogatories on *faits et articles* taken *pro confessis* imply an admission, and when sufficient may supply the want of the memorandum in writing required by 1235 of the Civil Code (1). *Douglas & al., & Ritchie & al.*, M. Judgment reversing 20 June, 1874. Taschereau. Ramsay, Sanborn, Loranger, JJ. Taschereau, J., dis.

On an action for the price of a horse the Defendant admitted that he had got the horse but that it was on trial and that he gave his check for the price but that it was only as a guarantee that he would bring the horse back. Without determining whether or not this was a commercial transaction the answers of Defendant it was *held* furnished a *commencement de preuve par écrit. Cox & Patton*, M. Judgment reversing 20 June, 1874. Taschereau, Ramsay, Sanborn, JJ., Loranger, J. dis., Rep. 18 J. 316.

A memorandum of a sale made at the request of Defendant, though not signed by him, will be a sufficient *commencement de preuve* to admit parol evidence on an action to execute a deed. *Bernard & Boutin & al*, Q. Judgment reversing 7 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a party by a letter refuses to receive delivery of goods giving as pretext the failure to conform to the conditions of the contract, such letter furnishes a *commencement de preuve par écrit*, and enables Plaintiff to establish his case by parol. *Lamont & Ronayne & al.*, M. Judgment confirming 15 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A receipt by cross, before two witnesses is valid and may be proved by witnesses present, although one could not sign except by crosss. *Latulippe & Bernard*, Q. Judgment confirming 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 69, 3 Leg. News 298.

NOTE in the report it is said that Ramsay, J., differed; but it was not on the case as reported. The dissent went only so far as this that there must be a cross made by the party otherwise there was nothing done.

Evidence of the rates of value for certain supplies to be furnished, will not be sufficient to establish a contract between Plaintiff and Defendant, though it may possibly be sufficient as a *commencement de preuve. Meigs & al, & Foster*, M. Judgment confirming 22 December, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

NOTE.—Dorion, C. J., was absent at delivering of Judgment, and took no part in *délibéré* being then administrator. *Query.*—Is a contract to construct part of a railway a commercial matter?

A deed between two parties J. and M., to which G. was no party, to the effect that J. was to complete a ship and to buy the timber from G. for

(1) In commercial matters in which the sum of money or value in question exceeds fifty dollars no action or exception can be maintained against any party or his representatives unless there is a writing signed by the former in the following cases.

1. Upon any promise or acknowledgement whereby a debt is taken out of the operation of law respecting the limitation of actions.
2. Upon any promise or ratification made by a person of the age of majority of any obligation contracted during his minority.
3. Upon any representation or assurance in favor of a person to enable him to obtain credit, money or goods thereupon.
4. Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain. The foregoing rule applies although the goods be intended to be delivered at some future time or be not at the time of the contract ready for delivery.

which M. was to pay is a sufficient writing within art. 1235 C. C., and that where G. acted on the faith of such writing to the knowledge of M., he has a right to a direct action against M. *Michon & Gauvreau*, Q. Judgment confirming 5 December 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 1 Q. L. R. 27.

Where a party has obtained judgment and takes execution, and defendant opposes an agreement with Plaintiff that he would accept an account Plaintiff owed defendant, in payment of this judgment, defendant and opposant cannot establish the allegations of the opposition by parol testimony without a *commencement de preuve par écrit. Kennedy & vir, & Latham*, M. Judgment confirming 20 Jan., 1883.

Where a proprietor, examined under oath as a witness, admits having ordered work beyond what is mentioned in the contract and specification, and for which no authority in writing has been given, the value of such work may be recovered, notwithstanding article 1690 C. C. (1) *Beckham & Farmer*. M. Judgment reversing, 29 Jan. 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, J.J. Rep. 22 J., 261. 1 Leg. News 115.

The admission by the heir and executors of a party deceased that he had ordered and paid for two casks of beer used by guests at an election feast is not a *commencement de preuve* to admit verbal evidence that the deceased had ordered the feast and agreed to pay for it, *Guevremont & Tunstall & al.* M. Judgment 22 Sep., 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 293.

(1) When an architect or builder undertakes the construction of a building or other works, by contract, upon a plan and specifications, at a fixed price, be cannot claim any additional sum upon the ground of a change from the plan and specifications, or of an increase in the labor and materials, unless such change and increase is authorized in writing, and the price of them is agreed upon with the proprietor.

Judicial admissions cannot be divided against the party making them. *O'Brien & Thomas*. M. Judgment confirming, 16 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 43.

An admission, whether judicial or extra-judicial, cannot be divided, so as to make proof by a party thereof against the party making such admission. *Sauvé & al. vs. Denis*. M. Judgment confirming. 3 Feb. 1880. Sir A. A. Dorion, C.J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 308. 3 Leg. News 75.

Testimony cannot be received to vary the terms of a written instrument; hence where the Defendant by an agreement in writing, undertook to grind the green paint furnished by Plaintiff in pure linseed oil, the Defendant could not be allowed to prove by testimony that the Plaintiff verbally requested him to use other materials. *Dominion Oil Cloth Co. & Martin*. M. Judgment confirming, 19 Sep., 1883. Rep. 6 Leg. News 344. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Parol evidence will be admitted to explain what is ambiguous in a deed. *Fulton & McNamee et al.*, M. Judgment confirming, 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier. JJ. Ramsay & Sanborn, JJ., dis. Confirmed in Supreme Court. 2 S. C. Rep. 470.

An error in a deed of sale as to price may be proved by verbal evidence. Q. Judgment confirming, 8 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis. And also in *Fair & Doolan*. Rep. 2 Leg. News 395.

And an action will lie to correct an error in the description of real estate in a contract. *Ward & Hayden*. Q. Judgment confirming, 3 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A broker's authority, by his own writing and signature and by the delivery of bought and sold notes, to bind

as between themselves the purchaser and seller making a transaction through him, has no application to, and cannot dispense him with the necessity of making proof by writing when he himself seeks to recover damages against his own customer, in respect of an alleged purchase and re-sale for and on account of the party from whom he has received an order to purchase. In such case he has two things to prove: First, his own authority to make the transaction: and, secondly, a purchase and re-sale. The first may be proved by verbal testimony, but the second, under art. 1235 C. C., in order to bind the party towards himself, requires a writing when the sum or value involved exceeds $50. *Trenholme & McLennan.* M. Judgment reversing, 20 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J., 305, 3 Leg. News 35.

Where it was admitted that there was no writing to establish the alleged contract, questions put to the witness tending to prove an acceptance of the goods by words were properly overruled. *Munn et al. & Berger.* M. Judgment confirming, 31 Oct., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 6 Leg. News 363. This judgment was reversed by the Supreme Court; but the reason why, has not been revealed, save by the varying tale of rumour. It is said, that the Supreme Court *held*, that no writing was necessary. This would be a comprehensible ground for it would only amount to a ruling on the interpretation of certain articles of the Code. But another ground has been confidently put forward by persons present when the judgment was delivered. They say, it was maintained that the evidence was stopped too soon, and that, although a writing was necessary, it did not follow this evidence might not be produced later. It is to be hoped that this last report is correct. It is better that the judges of the Supreme Court should be ignorant of the ordinary judicial rules in matters of detail, than that they should disastrously misinterpret the Code.

PRESUMPTIONS—A presumption means a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved. Stephen, Dig. of Evidence, p. 4.

Presumptions are either established by law, or arise from facts which are left to the discretion of the courts. 1238 C. C.

Legal presumptions are those which are specially attached by law to certain facts. They exempt from making other proof those in whose favor they exist. Certain of them may be contradicted by other proof; others are presumptions *juris et de jure* and cannot be contradicted. 1239 C. C.

No proof is admitted to contradict a legal presumption when, on the ground of such presumption, the law annuls certain instruments or disallows a suit unless the law has reserved the right of making proof to the contrary, and saving what is provided with respect to the oaths or judicial admissions of a party. 1240 C. C.

The authority of a final judgment is a presumption *juris et de jure.* It applies only to that which has been the object of the judgment, and when the demand is founded on the same cause is between the same parties acting in the same qualities and is for the same thing as in the action adjudged upon. 1241 C. C.

Presumptions not established by law are left to the discretion and judgment of the court. 1242 C. C.

Possession of a promissory note gives rise to a presumption that the possessor is owner of the note, and this presumption can only be set aside by the most positive testimony. *Cruice & Darmody.* M. Judgment confirming, Dec., 1875. Dorion, C. J., Monk. Ramsay, Sanborn, JJ.

Taking the quality of universal legatees in a petition to be allowed to take

up the *fait et cause* of the deceased, unexplained, is evidence of acceptance. The offer to settle a debt by paying at the rate of 10s. in the £ is evidence of the existence of the debt. *Rolland et al. & Beaudry.* M. Judgment confirming, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. This case is reported 2 Leg. News 131, 22 J. 72, 23 J. 255, but not these points.

It is for the party pleading error in a receipt to prove it. *Hart & Boudreault.* Q. Judgment confirming, 4 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

To effect a composition with his creditors, James Baylis gave his notes endorsed by McKeand, who, as security, took an assignment of the estate, including a property in the City of Montreal. McKeand leased this property to the Appellant James Baylis & Son, and subsequently reconveyed the property to James Baylis with the right to recover the rents accrued or to accrue. Later the Respondent was appointed sequestrator to the property in a hypothecary action by Crossley & Sons against McKeand, and he sued Appellant, to recover the rent from date of lease by McK. to the date of his appointment.

The Court expres-ing strong doubts as to the propriety of the appointment of a sequestrator in such a case, and reversing the judgment of the Court below.

Held, 1o. That the transfer of rent by McKeand to Baylis did not require to be registered to enable Baylis to receive the rents.

2o. That the receipts *sous seing privé* given by Baylis to the Appellant, were *primâ facie* evidence that the rent had been paid at the date of the receipt, and that it was for the Respondent to establish the contrary. *Baylis et al. & Stanton.* M. Judgment reversing, 24 March, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec., d'A. 350.

A principal is not bound by the admission of an agent after his agency has terminated. *Pinsonneault & Desjardins.* M. Judgment reversing, 17 Dec., 1879. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Routhier, JJ. Rep. 3 Leg. News 29, 24 J. 100.

Judicial admissions cannot be divided against the party making them. *O'Brien & Thomas.* M. Judgment confirming, 16 Sep., 1879, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, Rep. 24 J. 43.

An admission, whether judicial or extra-judicial, cannot be divided, so as to make proof by a part thereof against the party making such admission. *Sauvé et al, & Denis.* M. Judgment confirming, 3 Feb., 1880. Sir A. A. Dorion, C.J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 308, 3 Leg. News 75.

En règle générale l'aveu judiciaire est indivisible—C. C. 1243.

L'espèce actuelle ne tombe pas sous les exceptions de l'art. 231 du C.P.C. (1)

Il n'y a pas, dans l'espèce actuelle, un commencement de preuve par écrit suffisant, même en divisant l'aveu, et que la preuve faite, fut-elle légale, n'établit pas suffisamment le second prêt.

Règle "*Qui excipit non foletur.* *Fournier & Morin.* Q. Judgment reversing, 6 February, 1885. Sir A. A. Dorion, C. J., Ramsay Tessier, Cross, Baby, JJ. Ramsay, J. dissenting. Rep. 11 Q. L. R. 98.

A party contending that a promissory note, purporting on its face to have

(1) The answer of any party to a question put to him may be divided in the following cases, according to circumstances and in the discretion of the court;

1. When it contains facts which are foreign to the issue;

2. When the part of the answer objected to is improbable or invalidated by indications of fraud, or by bad faith, or by contrary evidence;

3. When the facts contained in the answers have no connection with each other.

been given for value, was given without consideration or for a special purpose, must prove such plea by clear evidence. *Morehouse & Burland.* M. Judgment confirming, February, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

When the Plaintiff is not in possession of the notes he sues upon, he must account for their not being in his possession. *Burland & Morehouse et al.* M. Judgment confirming, Feb., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Evidence that a note was given for accommodation and not in the regular course of business must be clear. *Parker & Fuller.* M. Judgment confirming, 18 Sep., 1877, Dorion, C. J., Monk, Ramsay, Tessier, JJ. Monk, J., dis.

Evidence of signature to promissory note. *Moreau & Larue et al.* M. Judgment confirming, 22 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The *prima facie* proof of payment afforded by a receipt in writing can be destroyed only by the clearest and most positive evidence of error. *Bell & Arnton.* M. Judgment reversing, 21 Dec., 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 20 J. 281.

Evidence to set aside a receipt must be clear and decisive. *Beaupré & McFee.* M. Judgment confirming, 18 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

The receipt of the Sheriff acknowledging having received money will not be set aside as given in error, on the sole evidence of the officer who gave the receipt, when the amount acknowledged to have been received is the amount which the party paying it owned, and ought to have paid. Nor will this be affected by the question arising on an *inscription en faux* by the sheriff denying having received the amount. *Larivière & The Corporation of Quebec.* Q. Judgment reversing, 3 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dis.

Evidence of the working of a system of stamps will not be sufficient to counter balance positive and consistent evidence as to a particular fact. So where a notary in the regular course of business ought to post a notice of protest on the 10th, and the post-office stamp indicates that it was only posted on the 11th, and the notary swears positively that he actually posted it on the 10th, general evidence of the post-office officials that the stamp is invariably correctly applied will not be sufficient to establish that the notice was not filed on the 10th. *Doutre & La Banque Jacques Cartier.* Judgment confirming, 28 Jan., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J. dis.

Evidence of error in Policy of Insurance.—Where a policy of insurance of life has been given for $2000, and the premium been paid for several terms, the Court will not maintain a plea setting up that the policy was made by error for $2000, and that it should only have been a policy for $1000, on the evidence that there is a marginal note on the application, said to have been written before the policy issued, indicating that the policy was to be for $1000, and that the premium was the usual premium of a policy for $1000, *Brodie & The Ætna Life Insurance Company.* Judgment reversing, 13 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Dorion, C. J., & Tessier, J., dis. Reversed in Supreme Court, 5 S. C. Rep. 1.

Evidence of the intention of the party to a policy of insurance cannot be established by verbal evidence of understandings between the insurer and the insured at the time of entering into the policy, for this would be to prove *outre le contenu de l'acte.* The terms of a special warranty are to be interpreted strictly.

In the absence of any evidence as to any technical meaning of the expression

"to go out in tow," or any special meaning attached to these words by the usage of the port of Quebec, it will be considered that the obligation "to go out in tow" is complied with, if the vessel has been towed out from her berth into the stream where she could use her sails. *Connolly & The Provincial Insurance Company.* Q. Judgment reversing, 7 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk & Cross, JJ. dis.

This case was taken in appeal to the Supreme Court where the judgment was reversed, 12 Dec., 1879. The following holdings express the different opinions of the learned judges of that Court:

Held, (Fournier and Henry JJ., dissenting), that the words "from *Quebec* to *Greenock*, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of *Quebec* on said voyage, and the towing from the loading berth to another part of the harbour was not a compliance with the warranty.

Per Ritchie, C. J.: The question in this case was not, if the vessel had gone out in tow, how far she should have been towed in order to comply with the warranty, the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of *Quebec*, if any existed in relation thereto.

Per Gwynne, J.: The evidence established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the *Traverse*, but ordinarily, at the date of the departure of the plaintiff's vessel, at least as far as the *Traverse*. 5 S. C. Rep. 258.

When a wife by opposition claims her moveables seized in the possession of her husband, and she establishes by evidence that all the things claimed by her except a few articles of trifling value are hers the court is justified in deferring to her the judicial oath to complete the proof. *May & L'Heureux.* M. Judgment confirming, 22 March, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 110.

When the act incorporating a company declares that the certificate of the secretary makes proof *prima facie* of its contents, and is no special denial of the contents of a certificate, setting forth the subscription of Respondent as a shareholder, the fact will be taken as proved. *The Stadacona & Fire Life Assurance Co., & Cabana.* M. Judgment reversing, 6 March, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Tessier, JJ. diss. Rep. 2 Dec. d'A. 380.

Where evidence is conflicting and the court cannot say that the judgment appealed from takes an untenable view of the evidence it should confirm.

Where a party refuses goods as not being equal to sample, and while returning the greater part, retains one piece to secure the re-payment of certain expenses of freight, he will not be precluded by such retention from complaining of the defects in the goods. *McInnes & Vezina et al.* M. Judgment confirming, 22 Sept. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Sicotte, JJ. Rep. 2 Leg. News 315.

Where the evidence is conflicting as to whether the captain of a steamboat was engaged by the month or by the season, the Court of Appeal will not disturb the judgment. *Battis & Beatty et al.* M Judgment confirming, 3 March 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where evidence is doubtful the Court of Appeals will not reverse the judgment appealed from. *Shortis & Martel.* Q. Judgment confirming, 7 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

In cases purely of the appreciation of evidence, the Court of Appeals does not interfere with the judgment appealed from unless it be clearly wrong. *Rutherford et al. & Pronty et al.* M. Judgment confirming, 21 May, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Where evidence is conflicting the Court of Appeals will not disturb the judgment appealed unless it be clearly wrong. *Foley & Cressey.* M. Judgment confirming, 19 Nov., 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

The Defendant, sued on a promissory note, pleaded, in the first place, that the signature was a forgery, but subsequently amended his plea, and alleged that he signed the note by error, intending to give a receipt for the amount stated therein. *Held*, that in the case of an illiterate person, who signed by making his mark, this change of defence was not an indication of bad faith, and the evidence appearing to the Court to sustain the amended plea, the judgment dismissing the action was confirmed. *Benoit & Brais.* M. Judgment confirming, 19 Sept. 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 6 Leg. News 342.

In penal actions, such as those instituted under sections 134 of the electoral act of Québec (28 Vict. c. 7) the evidence must be considered under the strictest rules, on the principle *que la fraude ne se présume pas. Neault & St-Cyr.* Q. Judgment confirming, 5 June 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 3 Q. L. R. 147.

Where a clerk who was entrusted with a sum of money by his employer to make purchases in England, attempts to account for it by saying it was stolen from him, he must establish the fact by evidence, and show that it was not lost by his fault. *Gravel & Martin et al.* M. Judgment confirming, June 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau J. dis. Confirmed in Privy Council, 5 May 1876. 22 J. 272.

But where money is lost from the custody of a clerk, and the employer accepts the explanation that it was stolen, and allows the amount to be charged to profit and loss, and retains his clerk in his employment without charging him with the loss of the money, he cannot set up the amount lost in compensation on an action for wages by the clerk. *Thomson & Watson.* M. Judgment confirming, 15 June 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 203.

The Respondent paid to the Appellant a debt due by M. et al., and took a subrogation of the claim. He sued M., and the Appellant had knowledge of the action and furnished the names of witnesses to prove the debt; but the Respondent obtained judgment for part only. *Held*, that Respondent was entitled to recover the balance from Appellant, but as he had not called Appellant in as *garant*, Respondent was not entitled to recover the costs incured in the suit against M. *Carreau & McGinnis.* Q. Judgment reformed on the ground that C. was not bound by the decision in the case of Mc. *v.* M., and that the merits of his defence should have been before the Court. 8 Nov. 1880. Dorion C. J., Monk, Ramsay, Cross, Baby JJ. Ramsay & Baby, JJ. dissented, Rep. 3 Leg. News 362. 1 Dec. Cour d'Appel 12.

Evidence of a quasi contract will not support an action in the assumpsit form for goods sold and delivered. *Ryder & Vaughan.* M. Judgment confirming, 12 Nov. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 3 Leg. News 391. 1 Dec. C. d'appel 19.

A report of *experts* is not a bar to the adduction of further evidence in the case. *Scott et al. & Paquette.* M. Judgment reversing, 22 September, 1879. Sir A. A. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ. 24 J. 141. 2 Leg. News, 335.

Evidence will be taken in appeal to determine whether the Appellant has

acquiesced in the judgment appealed from, if the affidavits of the parties are unsufficient. *Jordan & Jetté.* M. Judgment. September 1875. Dorion C. J. Monk, Taschereau, Ramsay, Sanborn, JJ. Also *Hotte & Champagne.* M. Judgment, 19 Nov. 1882. Sir A. A. Dorion, C. J., Monk. Ramsay, Cross, Baby, JJ. Rep. 25 J. 227. 2 Dec. d'A. 127.

On a trial for perjury the admission of evidence of extra-judicial confessions by prisoner's sister, tending to prove fraud concerted between prisoner and his sister, was illegal, and verdict set aside. *Regina & Guay.* Q. Judgment, 7 Sep. 1874. Dorion, C. J., Taschereau, Ramsay, Sanborn, JJ. Rep. 18 J. 306.

Of partnerhip.—Hart & Marmeau. Q. Judgment confirming, 5 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. *Vide* PARTNERSHIP.

A question of evidence as to the delivery of ties and commission due to Respondent. *Dame Lamontagne et vir.* Q. Judgment reforming, 4 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ.

Saisie arrêt.—Question of evidence. *Deblois & Bernier.* M. Judgment confirming, 23 January, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Damages to fences of farm, and for having removed manure. Merely a question of evidence. *Fletcher & Mathewson.* M. Judgment confirming, 22 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A party who cedes a debt due to him by another, may be a witness on an action by the party to whom it is ceded against the alleged debtor, and his testimony will be received with caution. *Cooke & Senécal.* M. Judgment confirming, 19 May, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Where a person is forcibly deprived of his possession of moveables, in an action of revendication he will not be held to establish his title as against the trespasser. It will be for the Defendant to justify his act, being a case where it is proper to apply the rule *spoliatus ante omnia restituendus. Lavoie & St. Laurent.* Q. Judgment reversing, 4 February, 1886. Monk. Ramsay, Tessier, Cross, Baby, JJ. Rep. 9 Leg. News, 66. 14 Rev. Leg. 262.

Two sleighs met in a narrow winter road, one of the sleighs was a double or *bob* sleigh, and carried a rack for the transport of bark. Immediately after this sleigh passed the other one, the horse of the latter, which had not shown any indisposition fell dead. The Appellant then sued the owner of the first mentioned sleigh, which was driven by the Respondent's son in damages, contending that the rack had struck his horse passing and killed it, and this by the negligence of respondent's driver, for whom respondent was responsible. Respondent pleaded that if Appellant had any action it was against his son and not against him, and that the Appellant's horse had not then struck by his sleigh, but had died of natural causes for which he was not responsible.

Held: 1o. That the son was driving for his father, and under his direction, and therefore the action was rightly brought against the father, if there was fault.

2o. That the evidence did not show conclusively that the horse died from the effects of a blow. *Courtois & Cloutier.* Q. Judgment confirming, 6 May, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Appellant, Plaintiff in the Superior Court sought to recover machinery transferred to one Joseph Kieffer by deed of sale before notary, on the ground that the deed was simulated, and that the Appellant was the real owner of the Defendant's, the purchaser and his two brothers, the purchaser alone contested the action; but one White intervened and alleged a purchase from Joseph Kieffer. *Held,* that the sale to Kieffer could not be set

aside by any evidence less strong than the deed of sale, and that even the admission by Kieffer that the sale was simulated, (if such admission existed which it does not) could not affect the rights of the purchaser in good faith from Kieffer. *Whitehead & Kieffer et al. & White* intervening. M. Judgment confirming, 30 June, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Vide also DECISORY OATH, POSSESSORY ACTION, CONTRACT, CHEQUE, CRIMINAL LAW.

EXCEPTION A LA FORME.—*Fauteux & Jackson.* M. 12, p. 147. *v.* PLEADING and PRACTICE.

EXCEPTION DECLINATOIRE. — *v.* PLEADING and PRACTICE.

EXECUTION.—Where a land was sold conditionally on the purchaser paying the price, and the purchaser did not pay and the land was in the possesion of the vendor, it cannot be taken in execution by a creditor of the purchaser. *Wilber & Boisvert.* M. Judgment reversing, 29 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier J. dissenting.

Of immoveable property—Opposition to sale of part. Lorsque par une opposition afin de distraire à une saisie d'immeubles l'opposant ne réclame qu'une partie indivise des immeubles saisis, le créancier saisissant ne peut faire ordonner la vente de la partie qui n'est pas réclamée par l'opposant avant que la contestation sur l'opposition ne soit vidée, ou du moins sans donner avis de sa requête à la partie saisie. *Chinic & vir & The Trust and Loan Co.* M. Judgment reversing, 31 Oct., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 3 Dec. d'A. 259.

Immoveables in the possession of third parties cannot be taken in execution as being in the possession of the curator of a vacant estate claiming title to such property. A judgment cannot be executed against those who were not defendants until it has been declared common. M. Judgment confirming, 20 September, 1882. Sir A. A. Dorion, C. J., Monk, Tessier, Cross, JJ. Rep. 2 Dec., d'A. 371.

Against lands.—The provisions contained in art. 642 C. C. P. (1) are applicable only to cases wherein the second or subsequent writ of execution against the lands of a debtor is placed in the sheriff's hands while he is still in possession of the writ on which the said lands have been seized, and while he is still in a position to proceed to the sale of such lands on the day fixed for the sale.

Accordingly, where an opposition has been filed to a seizure of land and the seizure has been suspended, and the sheriff has returned the writ and *procès-verbal* of seizure into the prothonotary's office, a second seizure of the same lands may validly be made for another debt, and the sheriff is not required to note such subsequent writ of execution as an opposition for payment upon the first writ. *Fuller et al. & Fletcher.* M. Judgment reversing, 15 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 25 J. 93. 4 Leg. News 96, 1 Dec. d'A. 102.

In certain cases, as when the same parties have another suit pending, which may alter the balance of indebtedness, the Court may suspend execution in a case decided, and the suspension of the execution may be extended to the costs of the attornies. *Dorion & Dorion.* M. Judgment confirming, 31 October, 1883. Sir A. A. Dorion, C.J., Monk, Ramsay, Tessier, Cross, JJ.

(1) When the sheriff has seized an immoveable upon a Defendant he cannot seize it again at the suit of another creditor, or of the same creditor for another debt, as long as the first seizure subsists ; but he is bound to note any subsequent writ of execution as an opposition for payment upon the first writ and in such case the first seizure cannot be abandoned nor suspended except in consequence of oppositions applicable as well to the seizing creditor as to those whose writs of execution have been noted as oppositions, or with their consent, or by order of a judge.

Monk & Ramsay, JJ., concurred as the order was now inoperative, the subsequent suit being decided.

EXECUTOR—WASTE.—An executrix appointed her husband her attorney to manage the estate, and he made a lease which, in the opinion of the Court, was disadvantageous to the estate, and for the purpose of deriving an unfair advantage, and he also received bonuses on several occasions without accounting for them. *Held*, sufficient ground for removal of the executrix from office. *Ross & Ross.* M. Judgment confirming, 21 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 7 Leg. News 65.

That executors empowered to act beyond the year and day and until the provisions of the will are fully executed, cannot claim to have the legatees, usufructuary or in property, impleaded with them.

That an executor, sued as such, and not denying the executorship, cannot urge the nonproof of their having made an inventory, as a want of proof of their having accepted the charge. *Gray et al. & Dubuc.* Judgment confirming, 5 Sep., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 2 Q. L. R. 234.

A testamentary executor is not liable for an over-payment made on account of the estate in good faith. *Bourret & Hurtubise et al.* Judgment reversing, 18 Sep., 1877. Dorion, C. J.: Monk, Ramsay, Tessier, JJ.

Where the powers of the executors of a will are extended beyond the year and day, they may sue instead of the heirs, while their powers last. *Lapointe et al. & Gibb et al.* Q. Judgment confirming, 5 Sept., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The account of, must be reasonable. *Daignau et al. & Kennedy.* M. Judgment confirming, 19 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The general powers of an exec include the engagement of clerk keep the books of the estate, an carry on its affairs. These gen powers are not restricted by the that the executor has received a le under the will, unless it be appa from the terms of the testament the legacy was intended as comp tion for special services.

The clerk employed by an ex to keep the books of the estat on for several years receiving $4 annum for his services, and hims tered the amount in the books. an acquiescence in that rate of neration. *Young et al. & Rattr* Judgment reversing, 6 December Sir A. A. Dorion, C. J., Ramsay, T Cross, Baby, JJ. Tessier & Cro dissenting. Rep. 8 Leg. News 1

Testamentary executors, for t poses of the execution of the seized as legal depositories of th able property of the successic may claim possession of it even the heir or legatee." 918 C. C.

The father of minors, legatee a will, cannot exclude the testa executor from the possessior moveable property of the su even for the use of the minor *mandeau & McDonnell.* M. J confirming, 27 May, 1886. S Dorion, C. J., Monk, Ramsa Baby, JJ.

Where testamentary execut ferred the control of the esta other person, who paid the m longing to it into a bank in name, and afterwards drew th that the Court below exercis per discretion in removing th tors from office, even without of fraudulent intention or act pation of the property. *Frenc McGee et al.* M. Judgment co 21 January 1886. Monk, Ram sier, Cross, Baby, JJ. Rep. M. Q. B. 59.

EXECUTORY CONTRACT.—TRACT.

F

FACTOR.—A factor or commission merchant is an agent who is employed to buy or sell goods for another, either in his own name or in the name of his principal, for which he receives a commission commonly called a commission. 736 C. S.

...ctor is commonly said to be an ...employed to sell goods or mer... ...be consigned or delivered to him ... his principal, for a compensa... ...commonly called factorage or com... ... *Story—Agency*, § 33.

...MS.—On special application, ...nd of poverty, Respondent was ...ed to send in factums in appeal ...ng. *Kingsborough & Pound.* Q. ...nt, Dec. 1877. Dorion, C. J., ...Ramsay, Tessier, Cross, JJ.

...S ET ARTICLES.—A husband, ...o a suit to authorize his wife, is ...party in the suit within the ...g of Art. 221 C. C. P. (1) and con...ly he cannot be summoned to ...interrogatories *sur faits et arti... Whitlock & Mathison et vir.* M. ...nt confirming, Dec. 1874. Do... J., Monk, Taschereau, Ramsay, ..., JJ.

...ficient answers *sur faits et ar...* ...ught not to be rejected *de plano* ...e answers taken as confessed, ...judge should give the party an ...unity of giving further answers, ...it appears that the answer as

...he parties in any suit may, at any ...ring the trial, and without retarding ...al or judgment, be examined upon ...ed facts pertinent to the issues. ...ded and replaced by the following: ...The parties may be examined upon arti... ...facts pertinent to the issue, and as wit... ...as soon as the pleas are filed, upon the ...issue as then joined. Q. 48 Vic., ...sec. 8.

given were in good faith, and such as might reasonably be considered sufficient. *McGreevy & Doucet.* Q. Judgment reversing, 6 May, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J. dis. Rep. 10 Rev. Leg. 535.

Where a party neglects to answer *faits et articles* and makes application to the Court to have his default taken off, and thus the *faits et articles* are taken as confessed, is reversed by the Court, and judgment is given entirely on the evidence so obtained, the Court of Appeal will reverse the judgment but will condemn the party so in default to pay the costs of the appeal. *McGreevy & Gagné.* Judgment reversing. 4 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. dis. as to the costs in Appeal, the Respondent being wholely in the wrong on that incident.

FALSE IMPRISONMENT.—*v.* DAMAGES. An action of damages will lie for false imprisonment where it appears the proceedings are malicious and without probable cause. *Beaudoin & Boisseau.* Judgment confirming, June 1875. Dorion. C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

There must be malice and want of probable cause to render a person liable for arresting another under legal process. *Beauchemin & Trudeau.* Judgment confirming, Sep. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ.

A creditor who arrests his debtor on *capias*, and has probable cause for so doing, is not liable in damages although the debtor can justify his proceedings. *Lapierre & Gagnon*, Q. Judgment reversing 7 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Tessier, J., dis. Rep. 8 Rev. Leg. 727, 1 Leg. News 32.

S., a debtor resident in Ontario, being on the eve of departure for a trip to Europe, passed through the city of Montreal, and while there refused to make a settlement of an overdue debt with his creditors, McR. *et al.*, who had instituted legal proceedings in Ontario to recover their debt, which proceedings were still pending. McR. *et al.*, thereupon caused him to be arrested, and S. paid the debt. Subsequently S. claimed damages from McR. *et al.*, for the malicious issue and execution of the Writ of *capias*.

McR. *et al.*, the respondents, on appeal, relied on a plea of justification, alleging that when they arrested the appellant, they acted with reasonable and probable cause. In his affidavit, the reasons given by the deponent McR., one of the defendants, for his belief that the appellant was about to leave the Province of Canada were as follows:—"That Mr. P., the deponent's partner, was informed last night in Toronto by one H., a broker, that the said W. J. S. was leaving immediately the Dominion of Canada, to cross over the sea for Europe or parts unknown, and deponent was himself informed, this day, by J. R., broker, of the said W. J. S's departure for Europe and other places" The appellant S. was carrying on business as wholesale grocer at Toronto, and was leaving with his son for the Paris Exhibition, and there was evidence that he was in the habit of crossing almost every year, and that his banker, and all his business friends knew he was only leaving for a trip; and there was no evidence that the deponent had been informed that appellant was leaving with intent to defraud. There was also evidence given by McR., that after the issue of the *capias*, but before its execution, the deponent asked plaintiff for the payment of what was due to him, and that plaintiff answered him "that S. would not pay him, that he might get his money the best way he could."

Held:—That the affidavit was defective, there being no sufficient reasonable and probable cause stated for believing that the debtor was leaving with intent to defraud his creditors: and that the evidence showed the respondent had no reasonable and probable cause for issuing the writ of *capias* in question.

Damages for illegal arrest under *capias*. Probable cause is a sufficient justification for arrest under *capias*. *Shaw & Mackenzie*. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Dorion, C. J., Cross, J., dis. Judgment confirming 12 Nov., 1880. Rep. 3 Leg. News 369. 2 Déc. de la Cour d'Appel 25.

On appeal to the Supreme Court the judgment was reversed, that Court being of opinion that the departure of the Plaintiff without paying a commercial debt after having avoided Defendants' collector, vainly resisted payment by an untenable action, and then setting his creditor at defiance by telling him he would not pay, and that he might get his money the best way he could, was not "probable cause" to justify the allegation of the Defendant that he was leaving the Province with intent to defraud.

Where a person who has been arrested under a *capias* and given bail, has been subsequently adjudged to file a statement, and make a judicial abandonment of his property, and has made default, that he cannot be condemned to imprisonment in consequence of such default. *Goldring & La Banque d'Hochelaga*, M. Judgment reversing, 21 March, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 29 J. 192.

FAUX, INSCRIPTION EN—v. IMPROBATION.

Held:—That a deed, purporting to be the copy of a notarial copy of a *minute* that cannot be found among the deeds of a notary deceased, makes proof of its contents, if it appears that there was an original deed of that kind. *Lamontagne & Contant*. Judgment reversing, 13 Sep., 1874. Monk, Taschereau,

Ramsay, Sanborn, Sicotte, JJ. Rep. 6 Rev. Leg. 607.

In the minute of a notarial deed apostiles, *renvois*, words effaced and interlineations should be paraphed and noted in the verifying clause.

A sheet containing a deed of security with hypothec stitched into the main deed, but not necessarily forming part of it, is a renvoi.

Such a deed of security not so paraphed and noted is not a notarial deed and will not create an hypothec.

Minutes should be written *d'un datille, sans y faire apostille en marge, ni en teste, ni qu'ils y laissent aucun blanc entremi, aussi si faute y est, elle sera reparée et remise à la fin de la note, et audessous, avant qu'il soit signé* (*Ord. du mois d'Oct.* 1535).

Evidence that a deed was written and signed elsewhere than where it purports to be written and signed tends to affect the authenticity of the verifying clause. *Panet & Hamel.* Q. Judgment reversing, 7. Dec., 1874. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

But this judgment was reversed in the Privy Council.

An holograph will, on the face of which appear certain over-writings, changes and alterations of an immaterial character, will not be set aside, and specially so in the absence of satisfactory proof that they were made by some person other than the testator. *Darling & Templeton.* M. Judgment confirming, 22 Dec., 1874. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Rep. 19 J. 85.

A mis-statement in a deed is not necessarily a *faux*. *Prevost & Latreille.* M. Judgment confirming, Sep., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

In Sheriff's title.—On an *inscription* by an interested creditor, a Sheriff's title may be declared *faux*. And this although the Sheriff's title be registered, and that the immoveable was passed into the hands of a third party whose title also was registered. *Carpenter & Déry.* Q. Judgment confirming, 5 March, 1877. Sir A. A. Dorion, C. J., Ramsay, Sanborn, Tessier, JJ. Sanborn, J., dis. Rep. 5 Q. L. R. 311. 8 Rev. Leg. 283.

Where a creditor opposes for money on the proceeds of a sale by the Sheriff, and it appears that the Sheriff and *adjudicataire* have made a transaction by which instead of the actual payment of the money they have substituted compensation between a debt due by the Sheriff who is insolvent, to the *adjudicataire* and his family, the return of the Sheriff will be declared *faux* and a *folle enchère* be ordered. *La Société de Construction Permanente de Québec & Martin.* Q. Judgment reversing, 7 Sept., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, McCord, JJ. Rep. 10 Rev. Leg. 619.

FEES.—*v.* REGISTRATION FEES.

FEES OF ADVOCATES.—*v.* ADVOCATES AND ATTORNEYS.

FENCES. — *v.* DAMAGES. — RAILWAY CASES.

FIRE.—*v.* DAMAGES.—LEASE, &c.

Responsibility of lessee.—The presumption established by articles 1629-1630 C. C. does not arise in favour of a lessor, when the fire arose in other premises leased by his tenant and communicating with those belonging to Plaintiff. *Pinsonneault & Gerikin.* M. Judgment confirming, June 1875. Dorion, C. J. Monk, Taschereau, Ramsay, Sanborn JJ.

Negligence of tenant.—Where a fire occurs through the negligence of the tenant, he will be liable in damages to the proprietor. *Steele & Jamieson.* M Judgment reversing, 22 June, 1876. Dorion, C. J., Monk, Ramsay & Tessier, JJ. dis. on the ground that the works carried on with knowledge of lessor were of a perilous nature, and that no

lack of diligence was shown. Confirmed in Privy Council.

FIRE INSURANCE.—*v.* INSURANCE.

FIRE IN WOODS.—*v.* DAMAGES.

FOLLE ENCHERE.—*v.* FAUX.—SALE.

FORCE MAJEURE.—*v.* DAMAGES.

It is incumbent on a party alleging *force majeure* as a justification to prove it. So when a clerk was entrusted by his employer with money to make purchases, and he could not produce the money and said it had been stolen from him, he was held liable for the money, failing to prove that it had been stolen from him, and that he had used due diligence to protect it. *Gravel & Martin et al.* M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger JJ. Taschereau, J. dis.

FOREIGN PRINCIPAL.— *v.* FACTOR.—MANDATE.

FORGERY OF RECEIPT. — *Brady & Church.* M. Judgment confirming, 28 April 1882. Sir A. A. Dorion, C. J. Monk, Ramsay, Cross, Baby, JJ.

FORGERY.—*v.* CRIMINAL LAW.

The burthen of proof is on the party producing a check, the signature of which is denied, to establish it is the check of the party whose signature it purports to bear.

Evidence that gives rise to a conjecture, but which of itself would not be proof, is not inadmissible under our system, as it may be used by the judge in deciding on which side is the balance of evidence. Proof of hand-writing is very uncertain. *Clark & The Exchange Bank of Canada.* Judgment reversing, 4 February 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Caron, JJ. Rep. 3 Leg. News, 45.

FORGERY OF BODY OF DRAFT.— Where a Bank draws a draft for $25 on one of its branches, and fails to advise such branch of the fact, and the draft is afterwards *raised* to one for $5000, and so skillfully as to deceive the branch office, which pays the amount of the draft as raised to another Bank, holding the draft in good faith, and, in consequence of such payment, this latter Bank pays $3500 on account thereof to the person from whom the Bank received it, the former Bank cannot recover from the latter Bank the amount so paid to it. *The Union Bank & The Ontario Bank.* M. Judgment confirming, 24 Nov. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J. dis. Rep. 24 J. 390, 3 Leg. News 386. 1 Dec. d'Appel 38.

FORMA PAUPERIS.—*v.* APPEAL,—CRIMINAL LAW,—FACTUMS.

If a party establishes under oath that he does not possess sufficient means to make the necessary disbursements, the court or a judge, upon being satisfied by affidavit that such party has a good cause of action or a good defence, may grant him leave to plead *in forma pauperis*, and may order all officers, of justice to afford him their services without any remuneration; but such party, if he fails in the suit is not exempt from condemnation to pay costs to the other party. 31 C. C. P.

Where a Defendant petitioned to be released from capias, and the petition was rejected, *held* that he could not appeal from such judgment *in forma pauperis. Canadian Bank of Commerce & Brown.* M. Judgment 12 Dec. 1874, Dorion C. J. Monk, Taschereau, Ramsay, Sanborn, J. J. Rep. 19 I. 110.

Legault & Legault 16 L. C. R. 163, Q.B. 1886.

FRAIS.—In French, costs, taken generally, are called *dépens de l'action. Frais* is sometimes used to express a particular item of costs, as *faux frais*, "*frais préjudicieux.*" (Ord. 1667, T. XII, art. 3, 1 Jousse 148) art. 29 C. C., which, however, would more properly have been called *dépens. Frais* is also used as a generic word to express all kinds of costs, as in article 1042 C. P. C.

Our law on the subject of costs arises principally out of the Ord. of 1667. It is in these words.

"Toute partie, soit principale ou intervenante, qui succombera même aux renvois, déclinatoires, évocations ou règlements de juges, sera condamnée aux dépens indéfiniment, nonobstant la proximité ou autres qualités des parties; sans que sous prétexte d'équité, partage d'avis, ou pour quelqu'autre cause que ce soit, elle en puisse être déchargée. Défendons à nos cours de parlement, grand conseil, cours des aides, et autres nos cours; requêtes de notre hôtel et du palais, et à tous autres juges, de prononcer par hors de cours sans dépens. Voulons qu'ils soient taxés en vertu de notre présente ordonnance, au profit de celui qui aura obtenu définitivement, encore qu'ils n'eussent pas été adjugés, sans qu'ils puissent être modérés, liquidés ni réservés." Titre XXXI, art. I.

FRANC ET QUITTE. —*v.* CONTRACT,—HYPOTHEC,—DAMAGES.

A property was sold "free and clear "of all incumbrances whatsoever, save "and except a vendor's privilege for "$5,250 in favor of the heirs McKen-"zie," which the vendors by the deed of sale undertook to pay, and have a discharge thereof duly registered.

Held:—1st That the above clause being equivalent to a stipulation of *franc et quitte*, satisfaction thereof was a condition precedent to the institution of an action for the purchase money or any portion thereof, or for arrears of interest.

2nd. That the purchaser, sued for an instalment of the purchase money, properly pleaded the vendor's default to fulfil the condition, by an *exception temporaire*.

3rd. That the purchaser, in order to be in a position to claim damages for non-satisfaction of the clause of *franc et quitte*, should put the vendor *en demeure* to remove the incumbrance and allow a reasonable delay for doing so. *Law & Frothingham.* M. Judgment reversing. 9 Feb. 1881. Sir A. A. Dorion, C. J., Monk. Ramsay, Baby, Caron JJ. Rep. 25 J. 172. 4 Leg. News 67.

FRANCHISE.—*Inequitable exercise of a Municipal.* A street Railway Company, authorised by statute (24 Vict. c. 84) to construct a track upon and along the highways in the parish of Montreal, leading into the streets of the City "and to use and occupy any and such "parts of any of the streets on high-"ways aforesaid as may be required "for the purpose of their railway track "and the laying of the rails and the "running of their cars and carriages," exceeds its powers by laying the track on one side of a highway, within six feet from the line of the adjoining property, the value of which was thereby greatly diminished. Where a right of passage is given it should be exercised *ex æquo et bono*, in accordance with the use and destination of the highway, so as to cause as little inconvenience as possible (compatible with the exercise of the privilege) to the public, and the adjoining proprietors. And, in the present case the track should have been constructed on the part of the highway used by vehicles, and not on one side thereof used by persons on foot, and where the running of the cars interfered with access to the adjoining property.

Neither the trustees of the Montreal Turnpike roads, nor the municipality of the parish, had any right to authorize the laying of the track of the railway on one side of the highway, so as unnecessarily to injure the adjacent property. *Ross & City Passenger Railway Co.* M. Judgment reversing, 16 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 60.

FRAUD.—*v.* EXECUTORY CONTRACT,—INSOLVENCY,—PARTAGE,—SUCCESSION.

A party himself guilty of fraud cannot seek that a contract be set aside on account of that fraud, even against the party who concocted and originally suggested the fraud. *Gareau & Gareau,*

M. Judgment confirming. 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Rep. 24 J. 248.

By agent.—Where an agent in making a contract fraudulently suppressed a material fact within his knowledge, his principal cannot profit by the fraud, although he was himself ignorant of the fact suppressed, *alterius circumventio alii non præbet actionem. de vig. in* 2, 49.

And so where shares were sold, purporting to be shares of an incorporated company, when, in fact, no such corporation was in existence, the error into which the purchaser was led was sufficient to annul the contract. *Chrétien* and *Crowley*, M. Judgment confirming, 19 Jan. 1882. Rep. 5 Leg. News 262, 2 Dec. d'A. 385.

It is not fraud for a father to purchase the furniture belonging to the husband of his daughter for her protection, and to leave her in possession of it in the common habitation of the family, and a purchase of this sort gives rise to no presumption of simulation. *Johnston & Scott.* M. Judgment confirming, 20 September 1882, Monk, Ramsay, Tessier, Cross, Baby JJ.

A purchaser who buys the property of his brother-in-law in order to assist him, agreeing to pay his debts, may licitly contract with a creditor, who does not know of the sale, to take less than the face value of the debt. *Blouin & Brunelle* M. Judgment confirming, 20 November 1882. Monk, Ramsay, Tessier, Cross, Baby JJ. Rep. 3 Dec. d'A. 58.

L'Intimé qui a acheté une terre de son beau-frère Scott, à la charge de payer les dettes de celui-ci, l'a fait dans le but de venir en aide à Scott, et que cette transaction n'est nullement entachée de dol. *Blouin & Brunelle*, M. Judgment confirming, 20 Nov. 1882. Monk, Ramsay, Tessier, Cross, Baby JJ. Rep. 3 Dec. d'A. 58.

Nullity of deed.—Hypothec.—L'annulation d'une vente ou donation d'un immeuble, pour cause de fraude, n'atteint pas l'hypothèque consentie à un tiers de bonne foi, lorsque l'emprunteur possède le dit immeuble en vertu de titres parfaits à leur face et n'indiquant aucun signe apparent de nullité. *Normandin et les Religieuses Carmélites d Hochelaga*, M. Judgment confirming 21 Dec. 1883. Sir A. A. Dorion, J. Ramsay, Tessier, Cross, Baby JJ. Rep. 3 Dec. J. A. 329.

FRAUDULENT PREFERENCE. — v. INSOLVENCY.

FREIGHT.—v. CARRIERS.

Freight is the recompense payable for the lease of a ship or for carrying goods upon a lawful voyage to the place of their destination. In the absence of express stipulation it is not due until the carriage is completely performed, except in the cases specified in this section. 2442 C. C.

Freight is due for cattle, received on board a ship, dying on the passage and thrown over-board. *Bickerdyke & Murray.* M. Judgment confirming, 24 March, 1882. Sir A. A. Dorion, C. J. Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 149.

NOTE.—There was also a case of *Head & Murray* decided the same day and involving a similar question.

Where goods were to be delivered to the holder of a bill of lading on payment of freight, and they were in fact delivered to the holder of the bill, a carrier, without paying freight, and on the sole credit of the carrier, who had funds from the real unknown consignee to pay the freight, the carrier having become insolvent, the captain cannot recover the freight from the consignee. *Fletcher & Bickford.* M. Judgment confirming, Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An action for freight may be brought in the name of the captain alone, if the contract be made with him. *Batcheldor & Bellefeuille.* M. Judgment confirming, 19 March, 1877. Dorion, C. J.,

Monk, Ramsay, Sanborn, Tessier, JJ. Dorion, C. J. & Sanborn, dis.

FRENCH LANGUAGE.—The English and French languages being both recognized by "the British North America Act of 1867," as official languages, an indictment may be framed in French. *Regina & Chouinard.* Judgment on reserved case, 8 Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 4 Q. L. R. 220.

GARANTIE.—The obligation of the *garant formel* is not extinguished by a *décret*, which does not purge the *charge*, even where the *acquéreur* becomes *adjudicataire* under the *décret Soulard & Letourneau*. Q. Judgment reversing, 7 Sep. 1874. Dorion., C. J. Monk, Taschereau, Ramsay, Sanborn, JJ. Dorion, C. J., & Monk, J., dis. Rep. 19 J 40.

Under the terms of the following letter the signer intended to make himself, and is personally liable:

Montreal, May 11th, 1877.
Messrs. Ritchie & Borlase,
Gentlemen,
We, the undersigned, acting as director and secretary of the Montreal Omnibus Company, hereby agree to see the account that Brown and St. Charles have against the above Company duly settled, provided the said account shall be made out and agreed upon as either the Court or arbitrators appointed shall decide.
(Signed) R. KERR,
As President of the Montreal Omnibus Co.

Although the above letter was evidently incomplete, having been intended to be signed by more than one individual, yet the signer waived the right he might have had to treat it as an incomplete document, by signing and delivering it to the Plaintiff's agents. *Kerr & Brown et al.* Judgment confirming, 14 Dec., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, J. dis. 23 J. 227.

A note payable on demand, given to a bank to secure an overdrawn account of the maker, as well as to secure the forbearance of the bank for other advances, must be considered in the light of a continuing guarantee, and that the endorsers of such a note are not relieved from their liability by the fact that the bank did not make a demand of payment till after the insolvency of the maker, about twenty-seven months after the date of the note. *The Merchants' Bank & Whitfield.* M. Judgment reversing, 23 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 2 Dec. d'A. 157.

A guarantee given to a Bank, which afterwards was amalgamated with another Bank, did not bind the guarantors towards the consolidated Bank. *The Consolidated Bank & The Merchants' Bank.* M. Judgment confirming, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk. J. dissenting, Rep. 6 Leg. News 284.

An undertaking to give a party an introduction to a firm of responsibility and standing is to be understood a firm having that standing at the time of the introduction, and it is not a guarantee of continued solvency. *Bowen & Gordon et al.* M. Judgment confirming, 19 Jan., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 300.

Un défendeur, dans une cause, peut appeler en garantie une seule des personnes, tenues conjointement et solidairement à la garantie, et qu'il n'est pas tenu, avant de procéder contre l'un d'eux, ou plusieurs d'entre eux, de mettre en cause tous les garants tenus conjointement et solidairement. *Ross et al. & Ross.* Q. Judgment reversing, 7 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk. J., dis. Rep. 14 Rev. Leg. 1.

The order to "give bearer what he wants" does not contain a continuing guarantee. *Lacroix & Bulmer.* M. Judgment reversing, 16 March, 1877.

Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 327.

Continuing, v. McGreevy & Mayrand. Judgment confirming, 7 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross. JJ.

V. Foley et al. & Cross et al. M. Judgment, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

GARANTIE ACTION EN ARRIERE.—*v.* SALE.

GARDIEN.—The guardian who has lost the possession of the things committed to his charge, may attach them by *saisie revendication. Moisan & Roche* Q. Judgment reversing, 22 Dec. 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier & Cross, JJ. dis. Rep. 4 Q. L. R. 47, 1 Leg. News 33, The same point was also decided in Quebec the same day in a Montreal case, *Gilbert & Coindet*, confirming the decision of the Superior Court in Montreal. The same judges Tessier & Cross, dis. Rep. 4 Q. L. R. 50.

The *gardien* of a first seizure has interest to intervene on a second seizure in a new suit. *Graham & Lepailleur.* M. Judgment confirming, 14 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A guardian will not be obliged to pay the costs of a contestation arising as to the ownership of the goods, by one who is not the debtor. His obligation is to produce the goods, or pay what is due by the debtor to the seizing creditor.

It is not necessary in the rule to offer the alternative of paying the value of the goods. *McCaffrey & Claxton et al.* Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Sir A. A. Dorion, C. J., dis. Rep. 3 Leg. News 292, 25 J. 191.

A *gardien* who has not signed the *procès-verbal*, (unless it be mentioned in the certificate that he cannot sign 560 § 5 C. C. P.) cannot be *contraint par corps* for failure to produce the goods seized. *Hamel & Marchildon.* Q. Judgment reversing, 8 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 245.

Under articles 21 & 22 J. 19, Ord. of 1667 the *gardien* is discharged *de plein droit* after the lapse of a year, *à compter du jour de sa commission*, as well of his responsibility to account as of his guardianship. *Brecon & Kane.* M. Judgment refusing leave to appeal 27 May, 1886. Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. dis.

GENERAL AVERAGE.—Contribution by the ship and freight and by the goods whether saved or lost, rateably and according to their respective values, is made for damages voluntarily sustained, and extraordinary expenses incurred for the common safety of the ship and cargo. These are called general or gross average losses and are as follows:

1o. Money or other things given as a compensation to pirates to ransom the ship and cargo or as salvage to recaptors;

2o. Loss by jettison;

3o. Masts, cables, anchors or other furniture of the ship cut away destroyed or abandoned;

4o. Damages caused by jettison to the goods which remain in the ship or to the ship itself;

5o. The wages and maintenance of seamen during the detention of the ship in the course of her voyage, by a sovereign power and during the necessary repairs of injuries of a nature to give rise to average contribution;

6o. The expense of unlading to lighten the ship, and enable her to enter a port of refuge or river when she is compelled to do so by storm or by pursuit of an enemy;

7o. Loss and expenses arising from the voluntary stranding of the ship for the purpose of escaping total loss or capture; and in general all damages voluntarily suffered and extraordinary expenses incurred for the common safety of the ship and cargo, from the time of loading and departure of the ship, to the time of her arrival and dis-

charge at the port of destination. 2552 C. C.

Average is a charge which accrues during a voyage and falls sometimes on the merchant, sometimes on the owner and sometimes on both. Whatever damage or loss is incurred by any particular part of the ship or cargo, for the preservation of the rest is called *general average*. *Smith, Mer. Law.* 401. v. SHIPPING.

GOOD WILL.—*v.* CONTRACT.—SALE.

H

HABEAS CORPUS.—*In civil matters.*

The petitioner was imprisoned for failing as *gardien* to produce goods seized, and he asked for *habeas corpus* in order to be liberated as he was a minor.

The Judge refused the application, as there was no notice to the party interested in maintaining the *contrainte*: and as the affidavit, which only contained a general reference to the allegations of the petition, was insufficient, inasmuch as it did not disclose any reasonable or probable ground for the issue of the writ. The petitioner was allowed to withdraw his application, and it was intimated that if it were to be renewed, which perhaps might not be necessary in the interests of the petitioner, in view of Art. 792 C. C. P., the Applicant should be prepared to meet the difficulty arising from section 25 of our Habeas Corpus Act, C. S. L. C., Cap. 95. *Exp. Gauvreau.* M. Judgment in chambers. Jan. 1878. Ramsay, J. Rep. I L. N. 53.

A writ of *habeas corpus* will not be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested appear to be irregular, if it is within the scope of the jurisdiction of the Court from which it issued. *Exp. Healey.* M. Judgment in chambers. Feb., 1878. Monk, J. Rep. 22 J. 138.

It is not necessary, in a rule for *contrainte par corps*, to give the guardian the option of paying the value of the goods.

The guardian is not discharged by the lapse of a year after proceedings taken against him to make him produce the goods.

The fact that the commitment orders the imprisonment of the guardian, until payment of an amount apparently in excess of what is due, cannot be urged under a *habeas corpus*, the *habeas corpus* not applying to persons imprisoned under a process in a civil matter, unless there be manifest absence or excess of jurisdiction. *Exp. McCaffrey.* M. Judgment refusing writ. 22 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 25 J. 188, 3 Leg. News 106.

The Court of Queen's Bench has no revisory power, except by way of appeal, over the proceedings of the Superior Court, and it cannot, on an application for *habeas corpus*, examine into proceedings of the Superior Court, in order to see whether a warrant committing a person to jail for *rebellion à justice* in a civil suit, requires him to pay, in order to get his discharge, a sum greater than he was condemned to pay by a judgment of the Superior Court. *Exp. Pollock.* M. Judgment quashing writ of *habeas corpus* 22 Nov. 1881. Sir A. A. Dorion, C.J., Ramsay, Tessier, Cross, Baby, JJ The Chief Justice dis. Rep. 5 Leg. News 293, 2 Dec., d'A. 60.

In criminal matters.—When a writ of *habeas corpus* has been refused by the Court of Queen's Bench in term, and no valid grounds being set up by the petitioner for his discharge, he is not precluded from presenting a new petition, *Exp. Williams.* M. Judgment, 18 March, 1875.

A writ of *habeas corpus*, on good cause shown, may be granted, the prisoner moving to be allowed to proceed *in forma pauperis. Exparte Louise Gournote.* M. Judgment, 11 Sep., 1375. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 336.

A writ of *habeas corpus* will be refused if applied for so late in the term that it could not be disposed of in the term. *Exparte Franklin.* C. S. L. C., c. 95, s. 9, 31 Car. II c. 2, s. 18. Dec., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An affidavit in support of an application for a writ of *habeas corpus* stating that, in so far as deponent knows the facts they are true, is valueless. And if on the return to a writ of *habeas corpus* it appears that the party having the custody of the person for whom the petition was presented, is the person to whom the writ is addressed, the return will be considered insufficient. *Exp. McCarthy.* M. Judgment, 26 Feb., 1875. In chambers. Ramsay, J.

On a petition for *habeas corpus* complaining of an illegal commitment, there should be a copy of the commitment, or an affidavit that it was applied for and refused. *Exp. Pollock.* M. Judgment, November, 1881. Sir A. A. Dorion, C. J., Tessier, Cross, Baby, JJ.

A writ of *habeas corpus* being granted, the Court of Queen's Bench will not order a *certiorari* to issue to bring up the record before the justice to see whether the evidence is sufficient to commit. *Exp. Narbonne,* 22 December, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dis. Rep. 3 Leg. News 14. 25 J. 330, 10 Rev. Leg. 63.

A district magistrate acting under the speedy trial act, acts as a court of record for all the purposes of the trial, and the proceedings connected therewith or relating thereto, although he does not retain the record, but files it in the court of general session, are really before this court in the rural districts. Being a court of record his judgment cannot be inquired of on *habeas corpus.* It may on writ of error which the Court of Queen's Bench has, by Statute, authority to grant, as also it has, as an incident of its general powers, the right to issue a *certiorari* to bring up the record. *Exp. O'Kane,* M. Judgment quashing writ of *habeas corpus.* Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The judgment of a Superior Court of law willl not be interfered with on the return to a writ of *habeas corpus,* and so a writ of *habeas corpus* in order to discharge prisoner from custody, on the ground that the prisoner was sentenced to a punishment not authorized by law, will be refused by the Court of Q. B. *Exparte McGrath.* Judgment Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a prisoner has been condemned to a punishment greater than the law allows, by a magistrate or other inferior tribunal, he will be discharged on *habeas corpus. Ex parte Burns,* Q. Judgment 6 Dec., 1873. Badgley, Monk, Taschereau, Ramsay, JJ. *v.* CONVICTION.

HEARSAY EVIDENCE.— *v.* EVIDENCE.

HOMICIDE.—*v.* CRIMINAL LAW.

Homicide is the killing of a human being by a human being. *Stephen Dig. Criminal Law,* p. 154.

Homicide therefore is the generic term of which murder, manslaughter &c, are the various species recognized by the law. *v.* MURDER.

HOTEL-KEEPER.—An innkeeper is responsible for the effects stolen from a traveller while lodging in his house, where it is not proved that the theft was committed by a stranger, and was due to the negligence of the traveller. (C. C. 1814, 1815.)

The oath of the traveller is sufficient to prove the loss, as well as the value of the things stolen. (C. C. 1677.) *Geriken & Grannis.* Judgment confirming. 15 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Monk, J. dis. Rep. 21 J. 265.

NOTE.—This responsibility of the Hotel-keeper has been modified by Statute 39 Vic. c. 23, Sect. 2 Q.

An Hotel Keeper was given a mare to keep. He was unable to return it, and said it has been stolen from his pasture by night, but that he was in no way responsible, for that the bargain was made with the son. *Held* that the bargain was only made with the son who was acting for the father at the hotel, and that it was ratified by the Defendant. *Lémard & Levy*. M. Judgment confirming, 25 Jan., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Baby, J. dis.

HUSBAND AND WIFE.—v. FAITS ET ARTICLES, HYPOTHEC, INTEREST.

The *emploi* of money stipulated *propre* of the wife by marriage contract, must be made incontinently at the acquisition of the property, and the declaration that the husband employs the money on property already purchased by him is only a *vente déguisée. Dionne & Ross*, Q. Judgment confirming, 3 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The separate property of the wife in the common habitation of the husband and wife is not property in possession of the husband. *The City of Montreal et al. & De Greene et vir.* M. Judgment confirming, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where goods are sold to the husband and credit is given to him, his wife separated as to property will not be held liable. (The case of *Hudon et al. & Marceau*, referred to 23 J. 45.) *Paquette & Guertin et al.* M. Judgment confirming, 14 June 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 2 Leg. News 210.

A wife *séparée de biens* is not liable for the price of necessaries furnished to the husband, and on his credit.

Nor can she become liable by endorsing his promissory note given in payment of such effects. *Bruneau & Barnes et vir.* M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Monk, J. dis. Rep. 3 Leg. News 301, 25 J. 245.

A husband Defendant in a suit to authorize his wife, is not in the record so as to be bound personally by the judgment as regards his separate and individual interest. *Comte & Lagacé et vir*, M. Judgment 23 January, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

La saisie de bien meubles, trouvés au domicile d'un débiteur, ne peut être annulée par une opposition de l'épouse, alléguant qu'elle est séparée de biens d'avec son mari, et que les effets saisis lui appartiennent, si la preuve établit que les meubles saisis, bien qu'achetés partie par son mari au nom de sa femme et partie par celle-ci, ont tous été payés des deniers du mari.

L'abandon fait à telle opposante par trois des créanciers du débiteur saisi, de meubles appartenant à celui-ci, ne peut faire cette opposante propriétaire des dits meubles. *Tardif & Campbell & al.* Q. Judgment confirming 6 May, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 434.

A wife *Commune en biens* with her husband, may, during his lifetime, validly renounce to a right of usufruct reserved to her in the event of her surviving her husband, on property possessed by him subject to a substitution in favor of their children. The fact that on her husband's death she renounced to the community will not affect the validity of the renunciation of her usufruct, which does not come within the prohibition of C. C. 1301.

The jurisprudence on the subject of art. 1301 (1) reviewed. *Langlais & Langlais*, Q. Judgment reversing 4 February, 1886. Monk, Ramsay, Cross, Baby, JJ. Rep. 9 Leg. News 90.

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(1) A wife cannot bind herself either with or for her husband otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect. 1301 C.C.

HYPOTHEC.—An hypothec granted by a *bona fide* settler over land in his possession as owner, but not yet granted or conceded to him, for a debt contracted previous to such grant or concession, is inoperative, although he may afterwards obtain a concession of such land. *Lepage & Banville.* Q. Judgment confirming, 8 March, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

An hypothec granted over a property by a person having no valid title is inoperative. That even if operative it will be purged by possession, of ten years in good faith, under valid title. *Pacaud & Rickaby.* Q. Judgment confirming, 3 June 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 310.

There are no sacramental words necessary to constitute an hypothec ; so when in a deed of donation it is stipulated—*Lesquels morceaux de terre susechangés resteront l'un pour l'autre de la somme de quinze cents piastres, tel qu'il est d'usage en fait d'échange.*"—an hypothec is created for the amount fixed as security against any *trouble* to which either party is exposed. *Caya & The Trust & Loan Company.* Judgment confirming, 8 Nov. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'Appel 10.

A husband may execute a valid hypothec in favor of his wife on his immoveable property, in lieu of a hypothec which she had by her contract of marriage, to secure a sum of money brought by her at the marriage and reserved as propre by her contract of marriage. *La Société de construction Montarville & Cousineau et vir.* M. Judgment confirming, 3 Feb. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 329.

Hypothec on property of community after its dissolution.—The heirs-at-law of the deceased wife are seized, by operation of law, of her share in such immoveable, and a husband has no power to hypothecate a *conquet* of the community after its dissolution, except for his own half of the property.

An hypothecary creditor has a right to an action *en déclaration d'hypothèque* against the *vendee* of the property hypothecated, even though such *vendee* may have re-sold the property if such sale be not registered.

Where the *vendee* proves a resale, not registered, and that he is no longer *détenteur* he will be condemned to costs up to plea filed.

The Plaintiff on proof of such plea may call in the person to whom the land is said to be resold and obtain judgment against him. *Lalonde & Lynch.* M. Judgment reversing, 18 February, 1875. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Ramsay, Sanborn, JJ., dis. Rep. 20 J. 158.

Tiers détenteur. Improvements.—Le tiers détenteur, qui a fait des améliorations sur l'immeuble hypothéqué, ne peut les enlever après le jugement en déclaration d'hypothèque, si, par son titre d'acquisition, il s'est chargé de l'hypothèque et s'est obligé de payer la dette hypothécaire (art. 2065 (1) & 2072, (2) C. C. *La Société Canadienne de construction de Montréal & Lapointe.* M. Judgment reversed, 26 Jan. 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 183.

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(1) The holder against whom the hypothecary action is brought, and who is neither charged with the hypothec nor personally liable for the payment of the debt, may besides the grounds of defence tending to destroy the hypothec, set up any of the exceptions set forth in the five following paragraphs if there be grounds for them.

(2) The holder against whom the hypothecary action is brought, may also demand that the surrender which he may be ordered to make be subject to his privilege of being paid what has been expended upon the immoveable, either by himself or by such of the persons from whom he derives his claim, as are not personally bound to the payment of the hypothecary debt, the whole in conformity with the rules contained in the title of Ownership and with interest from the day when such expenditures were liquidated.

A special mortgagee third in rank, obtaining legal subrogation in the rights of a general mortgagee first in rank, covering the same and other property, would not be allowed to use his recourse so as to defeat the equities of a second mortgagee, if the mortgagee first in rank was amply secured on the other property affected by it; but in the present case; *Held*:—That the Respondents, having bought from the firm of Sternberg & Co. a certain property hypothecated to the Royal Institution for the advancement of learning for a certain sum of money, and having obtained by paying this sum of the Royal Institution a legal subrogation against Appellant, vendor to Sternberg & Co., who had undertaken in his deed of sale of the said property to Sternberg & Co. to discharge it from said hypothec, was entitled to recover this amount from the Appellant, although he had failed to claim payment of his first mortgage, and had ranked for the third mortgage on the property affected by the three mortgages. *Saunders & The Commercial Mutual Building Society.* M. Judgment confirming, 24 March 1883. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 141.

A railway may be seized and sold by a holder of debentures, by which, in terms of the law, the road is mortgaged and hypothecated for security of the debentures. *The Corporation of the County of Drummond & The South Eastern Railway Co.* M. Judgment reversing, 20 Dec. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J. dis. Rep. 24 J. 276. 3 Leg. News 152.

Of the Crown.—The privilege of the Crown for its claims over those of private competing creditors being one of the minor prerogatives, is to be governed by the law of Canada derived from France, and not by the law of England.

The Ordinance of August, 1669, was not the origin of the legal hypothec of the Crown in France upon the property of its officers, *comptables*, but that such privilege existed there by the jurisprudence of the country before the creation of the Conseil Supérieur, in 1663.

In the case of a prothonotary of the late Court of King's Bench commissionned in 1884, who also then gave a bound for the due performance of his duties for a penal sum to the Crown, the registration of this bond at full length in 1845 was sufficient compliance with the Registry Ordinance (4 V., ch. 30, sects. 1, 10, 52) to preserve any claim arising to the Crown thereunder, upon all real estate of the said officer,

In such case the Crown had for the monies due a legal hypothec which attached to all the real property of the officer, without the necessity of description of any lands in the bond or in any memorial.

Though the Court House and Free Fund duties, &c., collectable and collected by the prothonotary, fo arrears of which the present claim of the Crown is made, were created and made accountable to the Crown by statutes subsequent to the execution and registration of the bond, the terms of the bond are sufficiently general to cover them, and moreover this is one effect of C. S. L. S., ch. 82, sect. 9.

The bond given by the officer as Prothonotary of King's Bench is available to the Crown under Judicature Act (12 V., ch. 38, sect. 104) to secure its claim for duties received by him as prothonotary of the Superior Court, but not for those received by him as clerk of Circuit Court, inasmuch as no registration of any bond for the duties of that new office, given under the same Act after his appointment thereto in 1849 was registered. *Monk & Ouimet, Attorney General.* M. Judgment reforming, 22 Dec. 1874. Dorion, C. J., Taschereau, Ramsay, Sanborn, Sicotte, JJ. Rep. 19 J. 71.

The allegation in a hypothecary action of the granting of a hypothec is, in effect, an allegation that the person creating the hypothec had power to do so, and therefore under such allegation

the Court will admit evidence to prove the existence of such power.

The Plaintiff in a hypothecary action must prove that the grantor of the mortgage was proprietor of the immoveable hypothecated at the time the mortgage was granted and that this cannot be shown by verbal testimony.

A deed of conveyance of land which has not been signed by the purchaser will not make proof that he had power to create a hypothec on the property.

Where two notaries, as witnesses, sign a conveyance of lands held in free and common soccage, their signatures must be proved like those of other witnesses. *Union Bank & Nutbrown.* Q. Judgment confirming, 7 February, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Cross, J. dissenting. Rep. 11 Q. L. R. 217. 8 Leg. News 76. 14 Rev. Leg. 64.

The Secretary-Treasurer of a building Society who has left the service of the Society and handed over all his books and vouchers to the Society, is entitled to a judgment discharging his security and to radiate the hypothec on his property given as security for his faithful administration, within a delay fixed by the Court, and in default of giving such deed the judgment to stand therefor. *La Société Permanente de Construction & Longtin.* Judgment confirming, 22 June 1887. Dorion, C. J., Monk, Ramsay, Tessier, Cross.

I

IDENTITY OF AN INCORPORATED ASSOCIATION.—An incorporated body bearing the name under which appellants sue, brought an action against respondents, formerly office bearers in said association to account. Respondents answered they were not account able to appellant, that the association had ceased to exist by that name, that they were officers of the old company under another name representing the old association. In fact respondents contended that they represented the old association which had only changed its name. On the other hand appellant contended that the facts did not bear that colour, that the office-bearers had been expelled from the association, that they had gathered together with other members of the association, forming a majority of the association, and formed a new company under another name, determining to appropriate the funds of the old association. The majority of the Court, affirming the judgment of the Court below, held that the respondents were not accountable to the appellant. Court Mount Royal No. 5694 of the ancient order of Foresters Friendly Society. *Montreal & Boulton & al*, M. 22nd November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dis., thought that the facts did not establish a charge of name merely, that an incorporated association cannot be destroyed by a vote of the majority so as to allow of the majority applying the funds to another object; that the respondents invoked the rights of a new company with a new charter, and that though a change of name did not alter the person, the adoption of a different name was an indication of the idea of a change to exclude the minority.

IDENTITY OF HEIR. — In 1866, the respondents received by onerous donation a lot of land and certain moveables animals and agricultural instruments. After the death of the donor the appellant, who claimed to represent his succession, discovered that the donation was not countersigned, and notified the respondents that he would bring an action to recover the subject of the donation, unless they agreed to a resiliation of the deed. Under this pressure they agreed to a resiliation of the donation, and by a deed of compromise of the 6th September of that year, they agreed to submit to arbitration the claim for enjoyment of the property from the time of the donation. Action was subsequently taken by Appellants against Respondents to recover the value of such enjoyment. Defendants pleaded that the deed of donation being by onerous title was really a sale; that Appellant had deceived them into believing that they had no valid title and that he represented the heirs of the donor, which was not true, and that it was by error they had agreed to the resiliation.

Held, that in any case the Respondents could not be called upon to account for the enjoyment of the property up to the time of the resiliation of the deed; that the deed of resiliation itself was obtained without cause and by fraud, and as it did not set up the legal considerations on which it was based, that it could not be regarded as a transaction under 1918 C. C. and was properly set aside. *Doutney & Richard*, M. Judgment 17 March, 1879. Rep. 24 J. 30.

IMPUTATION—*v.* PAYMENT.

A debtor of several debts has the right of declaring, when he pays, what debt he means to discharge. 1158 C. C.

This is called Imputation of Payment.

When the receipt makes no special imputation the payment must be imputed in discharge of the debt actually

payable which the debtor has at the time the greater interest in paying. If of several debts one alone be actually payable the payment must be imputed in discharge of such debt, although it be less burdensome than those not actually payable. If the debts be of like nature and equally burdensome the imputation is made upon the oldest. All things being equal it is made proportionally on each. 1161 C. C.

A broker sold for account of Respondents 13,000 bushels wheat, and acknowledged to have received $8000 on account of price and promised to pay it. The broker could not afterwards apply the money so paid by the purchaser towards the settlement of a proportionate rate on all sales made to him by the purchaser, but is personally liable to the vendor for the whole $8000. *Kershaw & Fitzpatrick et al.* M. Judgment confirming, Sep. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Confirmed in Privy Council.

INCIDENTAL DEMAND. — A set off against a demand is not always necessarily pleaded by an incidental demand. So an exception setting up that certain work was not performed according to the conditions of the contract was maintained. *Muldoon & Lacroix et al.* M. Judgment reversing, Dec. 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

INCORPORATED COMPANY, SHARES OF.—*v.* FRAUD.

INCORPORATION.—*v.* GENERAL ACT, CONTRIBUTORY.

The Provincial Government has power to incorporate by letters patent a company for the purposes of navigation within the limits of the Province.

A *requête civile* which does not on its face come within the provisions of Act. 505 ef the Code of C. P., may be rejected on motion.

Semble :—A purchaser, *subsequently* to incorporation, of shares subscribed *prior* to incorporation, and who has paid a call after his purchase, is estopped from contesting the validity of the original subscription. ***MacDougall et al. & The Union Navigation Co.*** M. Judgment confirming, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 63.

A subscriber to a company to be incorporated under letters patent, but who never subscribed *after* the incorporation, nor paid calls after such incorporation, is not liable to be sued for calls on the stock thus subscribed for. *The Union Navigation Co. & Couillard.* M. Judgment confirming, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 71.

INDIAN RESERVE. — Expulsion of person not of Indian blood. *L'Hero & Sicui et al.* Q. Judgment, 6 Dec., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

INDICATION OF PAYMENT.—*v.* DELEGATION.

Registration of deed containing Indication of payment to creditor of vendor. *v.* REGISTRATION.

INDICTMENT IN FRENCH.—*v.* FRENCH LANGUAGE,—CRIMINAL LAW.

IN FORMA PAUPERIS. — *v.* FORMA PAUPERIS.

INJUNCTION.—*v.* PROHIBITION.

A writ of injunction may be defined as a judicial process operating *in personam* and requiring the person to whom it is directed to do or to refrain from doing a particular thing. In its broadest sense the process is restorative as well as preventive, and it may be used both in the enforcement of rights and in the prevention of wrongs. In general however it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process. *High* on injunctions p. 2.

The secretary of a railway company

cannot be held liable for disobedience to an injunction addressed to the company, nor unless he be personally responsible for the contempt. *Tiernan & de Bellefeuille.* M. Judgment confirming, 15 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 374.

Proceedings in injunction which enjoin nothing and lead to no practical remedy will be dismissed. *Laing & The Board of Temporalities.* M. Judgment confirming, 16 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 3.

An injunction lies under the Merchant Shipping Act of 1854 (Imp.) sect. 65, with regard to a ship to be built or about to be built, enregistered under the provisions of the Act of the Parliament of Canada, 36 Vict., c. 128, s. 36. *Dinning & Wurtele et al.* Judgment confirming 7 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 31.

Where the commissioner of Public Works of the Province of Quebec, under the provisions of the Public Works Act of 1869 (32 Vict. c. 15, ss. 179, 180, 181), and under the terms of the contract itself, was proceeding to re-enter into possession of a public work in course of construction under a contract, that an injunction to restrain the commissioner from resuming possession, because, as the contractor alleged, his work had been interfered with, and a balance was due to him, was improperly issued.

Such injunction may be suspended by the Court of Queen's Bench in appeal, pending the hearing of an appeal from a judgment of the lower Court refusing to dissolve the injunction; and this notwithstanding the fact that the injunction had been disregardt ed by the Government Engineer to whom had been committed the task of resuming possession of the work. *Joly et al. & Macdonald.* Judgment reversing, 21 Dec., 1878. Sir A. A. Dorion, Monk, Ramsay, Tessier, Cross, JJ. Monk & Ramsay, JJ., dis. Rep. 23 J. 16, 9 Rev. Leg. 616.

Security for. — A private letter, whereby the signers bind and oblige themselves jointly and severally to be responsible for and to pay the costs and damages which may be suffered by the respondents etc., is not a compliance with the Quebec Injunction Act of 1878, 41 Vict., c. 14, s. 4, which provides that a writ of injunction shall not issue unless the person applying therefor first gives good and sufficient security in the manner prescribed by and to the satisfaction of the Court or a judge thereof, &c. *The Board of Management &c. & Dobie.* M. Judgment reversing, 14 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier JJ. 23 Q. 229.

Appeal to Privy Council.—A judgment setting aside an injunction to maintain a party in possession of a railway, is appealable as relating to lands. *Joly et al. & Macdonald.* M. Judgment, 22 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 104.

An injunction to prevent the Corporation of Montreal proceeding to the sale of the goods of a wife in execution of a judgment against the husband will be maintained. And the goods of the wife in the common domicile will not be considered as goods in the possession of the husband. *The City of Montreal & Greene et vir.* M. Judgment confirming, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 2 Leg. News 170.

M., contractor with the Quebec Government for building a railway, learning that the Government, under Public Works Act, 32 Vict., cap. 15, ss. 179, 180 (1869), was about to take possession of the road, which was not completed, obtained a writ of injunction to restrain the Government from interfering. The Government proceeded to take possession, and a motion to dis-

solve the injunction being rejected, obtained leave to appeal to the Court of Queen's Bench.

Held, that, under these circumstances, an order to suspend the injunction until the appeal could be heard, should be granted, notwithstanding the fact that the injunction had been disregarded. *Macdonald & Joly et al.* M. Judgment, 21 Sep. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier & Cross, JJ. Monk & Ramsay, JJ. were of opinion that no such order could be granted while the injunction was disregarded. Rep. 1 Leg. News 461.

Held, that a party seeking relief from an injunction, and whose motion to dissolve it has been rejected by the lower court, may, in the discretion of the Court, be permitted to appeal, though he appears to have disregarded the injunction and to be in contempt of court. *Macdonald & Joly et al.* M. Judgment, 18 Sep. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 448.

Where an injunction is dissolved, owing to legislation subsequent to the proceeding, the costs will be cast on the party suing out the injunction. *McClanaghan & The St-Ann's Mutual Building Society.* M. Judgment reversing, 4 Feb. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J. dis. as to costs. Rep. 24 J. 162. 3 Leg. News 61.

Goff & Robinson. M. Judgment confirming, 22 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

INSAISSABILITE.—Where property was bequeathed with the condition that it should be unseizable, and was substituted to the children of the heirs, and the executors sold a portion to one of the heirs, *held*, that the effect was to make a partition, and the revenues of said property were unseizable. *Molson & Carter.* M. Judgment reversing, 24 March 1883. Sir A. A. Dorion, Monk, Ramsay, Cross, Baby, JJ. Ramsay, J. without expressing any opinion on the effect of the deed, thought that if Appellant's proposition were true he was estopped from urging his own fraud. Rep. 6 Leg. News 372. 3 Dec. d'A. 279.

INSANITY *v.* JUDICIAL COUNSEL.

Insanity being once established it is for the party contending that the testator was sane at the time of making his will, and to prove that the insanity had ceased or that the testator acted during a lucid interval. In such case, the declaration by the notary in the will that the testator is sane, is not conclusive evidence of the fact, and does not throw the burthen of proof of the lucid interval on the party attacking the will. *Dixon & al, & Clore*, M. Judgment confirming Dec. 1874. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ.

INSCRIPTION.—*Enquête and merits.*

La partie qui inscrit sa cause à l'enquête et mérite, en vertu de l'article 317 du Code de Procédure Civile (1), doit en donner avis à l'autre partie.

D'après la trentième règle de pratique de la Cour Supérieure, le Demandeur qui n'a pas produit ses exhibits avec la déclaration, ne peut les produire sans en donner avis au Défendeur qui ne peut être forclos de plaider avant la production des exhibits. *Guilbault & al, & Vadenais*, M. Judgment

(1) When the defendant fails to appear or to plead to the action, the Plaintiff in suits other than those mentioned in articles 89, 90 and 91 may inscribe his case for proof in term or out of term if any is necessary, and such proof is then proceeded with before a judge, or before the prothonotary, who must swear the witnesses, take notes of their evidence and do whatever else it would be the duty of a judge of the Court to do in matters of proof. A defendant foreclosed from pleading is entitled to at least one clear days notice before proof, and he may cross-examine the witnesses and make such objections as he thinks proper of which the prothonotary must take notes, but he is not entitled to produce witnesses. Proofs *ex parte* may be taken at any time except between the 9th July and 1st September.

reversing 15 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 228.

INSCRIPTION EN FAUX—*v.* FAUX.

INSOLVENCY—*v.* BANKING,—LEASE, &c.

By bankruptcy, *faillite*, is meant the condition of a trader who has discontinued his payments. 17 § 23 C. C.

On nomme faillite la situation d'un homme qui s'annonce, soit par une déclaration précise, soit par ses actions, pour être hors d'état de faire face à ses engagements. N. Denisart, Faillite.

On donne la qualité d'insolvable aux personnes qui ne peuvent payer ce qu'elles doivent. An. Denisart, vbo Insolvable.

Déconfiture—terme synonime d'insolvabilité. N. Denisart, vbo Déconfiture.

Le cas de déconfiture est quand les biens du débiteur, tant meubles qu'immeubles, ne suffisent aux créanciers apparens. C. de Paris, Art. CLXXX.

A debtor shall be deemed insolvent, and his estate shall become subject to compulsory liquidation. *v.* Insolvent Act of 1864, section 3. Abbott, p. 15. Also Insolvent Act of 1869, section 13, Popham, p. 36.

A debtor shall be deemed insolvent. *v.* Insolvent Act of 1875, section 3. Wotherspoon, p. 13.

A creditor who alleges that his debtor while insolvent has made payments to another creditor knowing his insolvency, has a right under C. C. 1036, (1) to sue the latter in his own name, and to

(1) Every payment by an insolvent debtor knowing his insolvency is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received, or the value thereof, for the benefit of the creditors according to their respective rights.

ask that such sums be paid into Court for the benefit of the creditors according to their respective rights. The relation of the parties, and other facts established in the present case prove the creditor's knowledge of the debtor's insolvency. *Boisseau et al. & Thibaudeau et al.* M. Judgment confirming, 27 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 7 Leg. News 274.

Insolvency of a trader depends on his inability to meet his commercial liabilities. *Fontaine & Rooney.* Q. Judgment confirming, 8 June, 1876. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 415.

A trader who cannot meet his liabilities is properly thrown into insolvency. And it is no ground for a petition to have the writ of attachment quashed thatth e note whichforms the subject of the creditors debt is not yet due. *Rutherford & La Banque Nationale.* Judgment confirmed, 21 Dec. 1878. Dorion C. J., Monk, Ramsay, Cross, Routhier, JJ.

Any creditor may contest the fact of the insolvency of his debtor and may petition to set the proceedings aside. *Langevin vs. Grothé & Lebeau.* M. Judgment reversing, 22 September, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

Act of.—A party became insolvent and assigned. Before his estate was wound up, and while his property was still in the hands of the assignee, he obtained his discharge and recommenced business. He contracted a new debt and judgment went against him, on which an execution issued, and his creditor seized part of his estate in the hands of the assignee to the previous insolvency. The property was allowed to remain under seizure more than fifteen days. This was held to be an act of insolvency. *The Bank of Toronto & Henderson.* Judgment reversing, 21 Sep. 1878. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where a party declares himself a

trader and an insolvent, he will not be allowed to intervene and demand that the proceedings be suspended on the insolvency, on the pretention that he was neither a trader nor insolvent, while the assignment remains in force. *Whitlock & Tyre.* Judgment confirming. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A writ of attachment issued against the property of a debtor, styled a joiner, was acquiesced in by him for nearly a year, and during which time several proceedings were taken. He then petitioned to have the attachment set aside on the ground that he was not a trader. The Court *held*, reversing the judgment of the Court below, that he not being a trader, nor so styled, but a joiner, the Court had no jurisdiction and the writ was quashed. *Lefebvre & Fulton.* Judgment reversing, June 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Ramsay J. dissenting, thought his acquiescence, equal to a declaration, and therefore was within the ruling of *Whitlock & Tyre.* He distinguished it from the case of *Grothé & Lebeau*, decided in Sep. 1876, the petition being at the instance of a creditor.

The insolvency of a partnership renders the partners subject to compulsory liquidation. *Knight & Ross.* Q. 8 March, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ. Rep. 10 Rev. Leg. 208.

Where an assignee has been appointed at a meeting of the creditors of an Insolvent, his nomination cannot be set aside at the discretion of the Court, and without a valid objection. So where it has been set aside, and another assignee appointed on the ground that the latter had the majority of votes, and it appears that this result was only arrived at by erroneously striking off the names of creditors entitled to vote, the judgment will be reversed. *Murphy & Connolly et al.* Q. Judgment reversing, Dec. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Assignee. Right of Court to appoint. —When it appears that the assignee has been named through fraud, the judge may, in virtue of Sect. 37 of the Insolvent Act, declare the assignee to be duly appointed who had the majority of votes of those qualified to vote at the meeting. *Lemieux et al. & The Quebec Bank.* Judgment confirming, Q. 7 Dec. 1880. Sir A. A. Dorion. C. J., Monk, Ramsay, Cross, JJ. Rep. 1 Dec. d'A 91.

Under Section 2 of the Insolvent Act of 1869, an assignment to an official assignee for the District of Montreal, by an Insolvent, whose domicile and place of business is in the County of Hochelaga, is valid, although there be an official assignee for the County of Hochelaga.

And the official assigneē for the County of Hochelaga has no interest to intervene in the matter. *Stewart & Vilbon.*—M. Judgment, Sep. 1874. Sir A. A. Dorion, C. J., Monk, Taschereau Ramsay, Sanborn, JJ.

The assignee represents the Insolvent, who is his *auteur*, where there is no fraud. So the estate is bound by a deed *sous seing privé* releasing a debt due the Insolvent, and, *semble*, if the signature be contested it should be denied under oath. *Prevost & Melançon et al. es qu.* M. Judgment reversing, 22 June 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 167.

An ordinary petitory action will not lie against an assignee in insolvency for the recovery of real estate in his possession as such assignee. *Fair & Désilets*, M. Judgment reversing 26 January, 1881. Sir A. A. Dorion, C. J., Monk. Ramsay, Cross, Baby, JJ. Monk, J., dissenting. Rep. 4 Leg. News 84. 1 Dec. d'A. 212.

Assignee.—Right to sell.—Evidence. —Celui qui poursuit pour le recouvrement d'une créance que lui aurait cédé le syndic à une faillite, agissant en vertu d'une résolution des créanciers, doit produire copie de cette résolution,

et que la déclaration dans l'acte de cession, que le syndic est autorisé par les créanciers ne fait pas une preuve suffisante de cette autorisation. *Tourville et al, & Patrick et al.*, Q. Judgment confirming 5 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 11 Rev. Leg. 534.

NOTE.—Another judgment, in which the same point was decided between the same parties. Rep. 11. Rev. Leg. 442.

An appeal may be instituted by an interim assignee. *Major et al, & Chadwick*, M. Judgment Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A motion to suspend the case of an insolvent in gaol on *capias* until the assignee can come in will be rejected. *Heneman & Smith.* Judgment 16 June, 1877.

The duties of an assignee under the insolvent acts are not of a judicial character. *The Mechanics Bank & Brown*, M. Judgment confirming 22 december, 1874. Dorion, C. J., Ramsay, Sanborn, JJ. Monk, Taschereau, JJ., Dis. Reported 19 J. 295.

Only those creditors who have filed their claims in conformity with sect. 122 of the Insolvent Act of 1869, can be counted as forming the numerical majority required by section 94 of said act, and it is only their claims which can be reckoned to make up the three quarters in value also required by the said section. *Toussaint & Wurtele*, Judgment reversing 5 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Ramsay, J., concurred with the Court in these rulings, but dissented from the judgment on the ground that it was proved that the insolvent kept no cash book.

NOTE.—*v.* Act of 1875, sect. 52.

Under the repealed insolvent act of 1875, sect. 104, a claimant, whose claim is contested on grounds of objection distinctly stated, must establish his claim by legal evidence on the point raised.

A general contestation will not be sufficient to raise such contestation of special or exceptional matter. *Watson et al, & Samson.* Judgment reversing 7 Dec., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Q. L. R. 365.

Nomination of assignee. — Any creditor or creditors whose claim or claims exceed $500, dissatisfied with a resolution of the creditors of the insolvent naming an assignee may, in virtue of section 37 of the Insolvent Act of 1875, apply to a judge in Chambers to set aside the resolution and declare the election void.

On such application the judge may reject three notes of certain creditors, illegally admitted and may order a new meeting of creditors whose claims have been filed according to law. *Watson et al. & Samson et al.* Judgment reversing 7 Dec., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 8 Leg. News 606.

Where the assignee is the nominal Plaintiff, for the benefit of a party claiming as creditor, there must be evidence that the party in whose suit the action is brought is a creditor. *La Banque Jacques Cartier & Beausoleil.* M. Judgment reversing, 25 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 1 Déc. d'A. 151. 4 Leg. News 116.

The Consolidated Bank of Canada proved a claim for $153,464.62 against the insolvent estate of Mulholland & Baker, secured by the individual liability of Henry Mulholland & Joel C. Baker, two of the members of the firm, under a letter of guarantee of the 20th of January 1876, this security valued in the claim at $75,000, and also by a transfer from M. & B. of two mortgages on the property of William P. Bartley for $25,000 each and valued at $45,000.

The Merchants' Bank proved its claim secured by a transfer of another mortgage on William P. Bartley's property for $25,000, and which the Bank valued at $13,000. On the claim made by the Consolidated Bank, Leslie, a crediter of Mulholland & Baker, contested the transfer made by M. & B. to the Bank of the two mortgages against Bartley's property, and asked that this transfer be set aside as having been made in fraud of the creditors. On the claim of the Merchants' Bank, Leslie, on the same grounds, contested the transfer made to the Bank by M. & B. of their other mortgage on Wm. P. Bartley's property. Rodgers and others, also creditors of M. & B. contested; on the claim made by the Consolidated Bank, the validity and effect of the letter of guarantee given by Henry Mulholland & Joel C. Baker on their private estates, as being in fraud of the creditors of the firm.

As these contestations could not affect the claims of the Consolidated Bank and of the Merchant's Bank against the estate of Mulholland & Baker, the contestants had shown no interest in their contestations, and the creditors could only challenge the validity of the security held by the Banks by a direct action in the Superior Court, or by contesting the claims which might be made upon such security on the individual estates of Henry Mulholland & Joel C. Baker, or of William P. Bartley, respectively. *The Consolidated Bank of Canada & Leslie.* M. Judgment reversed, 25 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ See also case of the *Merchants' Bank & Leslie & Rogers & The Consolidated Bank.* Rep. 1 Dec., d'A. 198, 3 Leg. News 398.

Act of 1875. *Action by creditor. Proof of claim.*—The Respondant, assignee to the Insolvent estate of Rémi Champagne, having refused to take proceedings to recover a sum of $320 paid by the Insolvent to the Appellant, within thirty days immediately preceding the issue of the writ of attachment, Stirling, McCall & Co. were authorized to take the proceedings in the name of the assignee, but at their own expense and risk.

Held:—1o. By the Superior Court, that the Re-pondent could not recover because he had not proved the amount of the claim of Stirling, McCall & Co.

2o. By the Court of Review, reversing the judgment of the Superior Court, that the assignee was entitled to recover.

3o. By the Court of Appeals, (Sir A. A. Dorion, C. J., and Cross, J. dissenting), that Stirling & McCall & Co. were the real Plaintiffs; that the Bank committed no fraud in receiving under a conservatory process the amount of its claim, and that the process was beneficial to the creditors of the estate; that Stirling, McCall & Co. had no greater right to this sum than the Appellant; that, as the amount of the claim of Stirling & McCall & Co. had not been proved, they had not shown any right to any particular share of the sum sought to be recovered and that the action was rightly dismissed by the Superior Court. *La Banque Jacques Cartier & Beausoleil.* M. Judgment reversing, 25 Jan., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Sir A. A. Dorion, C. J. & Cross, J., dis. Rep. 1 Dec., d'A. 751, 4 Leg. News 116.

No hypothec can be acquired on real property without registration, and that no hypothec can be acquired on the property of a person notoriously insolvent. *La Banque Jacques-Cartier & Brown.* M. Judgment reversing, 22 Dec., 1874. Dorion, C. J., Taschereau, Ramsay, Sanborn, Loranger, JJ. Rep. 19, J. 100.

An hypothec accorded by a person notoriously insolvent will be set aside. *Lapointe et al, & Gibb et al.* Q. Judgment confirming, 5 Sep., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Fraudulent preference. Hypothec.—The registration of a hypothec within the thirty days previous to an assign-

ment under the Insolvent Act of 1875, is without effect, and especially when the hypothec was granted by the debtor while insolvent to the knowledge of the creditor receiving such hypothec. *M. Gaudron & Stewart.* M. Judgment reforming, 17 Sep., 1880. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 323.

A company unable to pay its debts, taking up a note discounted at a bank by one of its directors within thirty days of its insolvency, will be held, by so doing to have made a preferential payment to such director, and he will be condemned to retire the amount so paid. *Beard & Dontee.* M. Judgment confirming, 22 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Monk, J., dis.

Composition.—Notes given to accept a composition cannot be recovered on, and it does not signify what was the cause of the indebtedness. *Wilkes & Skinner.* M. Judgment confirming, 6 March, 1882. Monk, Ramsay, Cross, Baby, JJ.

The endorser of a composition note given by a debtor to his creditor in carrying out a settlement (not under the Insolvent Act) for fifty cents in the dollar, was not liable for the amount of such note, where it appeared that the debtor, for whom he endorsed the note as surety, and from whom he had taken a transfer of his estate as collateral security, had secretly given the plaintiff (the creditor) his own notes for the balance of his claim, in order to obtain his assent to the composition, and the creditor had already received fifty cents on his claim. *Arpin & Poulin.* M. Judgment confirming, 14 June, 1878. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ. Rep. 22 J. 331. 1 Leg. News 290.

But the endorsers of composition notes for an insolvent remain liable thereon, though the discharge of the insolvent may have been annulled by the court, and though the insolvent may have given other notes by way or preference to some of his creditors. *Marchand et al. & Wilkes.* M. Judgment confirming, 17 Sep., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ., Ramsay, J., dis., thought this case involved the same principle as the case of *Arpin & Poulin.* The position of the endorsers was changed by the composition not being carried out, and Wilkes knew of the fraud. 3 Leg. News 318.

The endorser of composition notes is not discharged from liability thereon by the mere fact that the compounding creditors have secretly stipulated with the debtor that he shall pay them an amount in excess of the composition rate, as the condition of their consent to the composition, and especially where the endorser, as the consideration of his endorsement, obtained a transfer of the insolvent's entire stock-in-trade and assets, which he still retained when sued on the composition notes. But the endorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes. *Martin & Poulin.* M. Judgment reforming, 24 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ., Cross, J., dis. Ramsay, J., did not concur in some of the reasons given for the judgment; but concurred in the judgment because Poulin was in a peculiar position, and if he were discharged he would be really keeping what he had gained by the transaction, and avoid his liability. Rep. 4. Leg. News 20. 1 Dec. d'A. 75.

Security for composition. Concealed protection to surety declared legal.—Le nommé Godin, failli, a fait un arrangement avec ses créanciers par lequel il a obtenu une extension de délai, en fournissant le cautionnement de l'Appelant pour le quart de la somme due. L'Appelant a consenti à devenir la caution de Godin, et, la condition que celui-ci déposerait chaque samedi, durant un an, à la Banque Ville-Marie, un certain montant à intérêt au nom de l'Appelant *in trust*, ce dernier ayant le droit de retirer le dit argent et de le payer en à-compte d'endossements qu'il avait donnés pour garantir son cautionnement. Cette convention eut lieu entre l'Appelant et le failli hors de la connaissance

des créanciers, qui n'en furent informés que lors de la faillite de leur débiteur. Ces dépôts ont été régulièrement faits par Godin jusqu'à l'epoque où il fut mis en faillite. Aujourd'hui l'Intimé, syndic à la faillite, réclame le montant de ces dépôts de l'Appelant, qui les a retirés de la banque et s'en est servi pour diminuer d'autant sa responsabilité vis-à-vis des créanciers de Godin.

Jugé:—Infirmant le jugement de la Cour inférieure. (Monk, and Ramsay. JJ., *dissentientibus*.) 1o. Que la convention entre Godin et l'Appelant est légale et nullement entachée de fraude;

2o. Que le cautionnement de l'Appelant ne devant prendre effet que dans le cas où Godin ne paierait pas lui-même, et le dépôt étant tout simplement un gage entre les mains de l'Appelant, l'Intimé ne pourrait le réclamer qu'en déchargeant l'Appelant de son obligation. *Normand & Beausoleil.* M. Judgment reversing, 28 April, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk, Ramsay, JJ., dis. Rep. 2 Dec. d'A. 215.

NOTE.—And this is the rule in all contracts d'atermoiement, *v.* COMPOSITION.

A sum of money paid within thirty days before a demand of assignment, by a debtor unable to pay his debts, to a person knowing such insolvency or having means to know it, is void and on suit of assignee may be recovered back. *McArthur & Mulholland.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J. Rep. 2 Leg. News 211.

Payment by preference.—A sale of moveables, (not in the ordinary way of business), by a trader, when actually insolvent, though he did not become an insolvent under the act until two months afterwards, to a creditor who knew or had reason to know of his insolvency, the price being credited by the purchaser to his debtor, is fraudulent and null and void, though the creditor may have allowed the full value of such articles on account of his claim. *Kane & Racine.* M. Judgment, 3 Feb., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep. 24 J. 216. 3 Leg. News 66.

The Defendants were creditors of Hagens & Co., on two notes given for glue sold on or about the 1st and 10th April, and amounting to $971.46 which notes were discounted by the Defendant's about the 19th May. The insolvents gave in payment of the notes $1.055.42 worth of glue, and Defendants paid the notes and returned them to the insolvents. *Held*, that although the transaction was one not usually occurring in business it is not conclusive that it was a preference, granted by the insolvents in view of insolvency, and that the Defendant's knew that H. & Co, were insolvent at the time. *Whyte & McArthur et al.* Judgment confirming, 21 Dec., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Fraudulent preference.—D. & W., were endorser's of H. D's paper for credit, particularly with a view of allowing H. D. to build a ship. H. D. failed and his estate made mortgage of ship over to D. & W. The latter, desiring extension of time for the payment of the endorsements, applied to the bank for this accommodation, and offered as securitythe mortgage which was transferred to the bank. D. & W., afterwards stopped payment and owing to these transactions. *Held*, reversing the judgment of the Superior Court, 4 June, 1880, that this was not a fraudulent preference as D. & W., were not notoriously insolvent at the time of the transfer, and as the transaction with the bank was not a notice of their insolvency to the Bank. *La Banque Stadacona & Walker.* Q. Judgment, 4 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 381.

Promissory note of insolvent.—L'Appelant, syndic à la faillite de Thomas Beaudoin, a vendu à F. X. Lemieux, son père, a payé le prix de vente, partie en argent et partie au moyen d'un billet du failli.

JUGÉ:—Infirmant le jugement de la Cour Supérieure, que la vente du fonds de commerce était une cause valable pour le billet en question et, qu'à tout événement, l'Intimée, qui représente son mari décédé, ne pourrait se refuser de payer le billet qu'en rapportant le fonds de commerce pour lequel il a été donné. *Lemieux & Bourassa.* Q. Judgment reversing, 3 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 305.

Preferential Payments.—v. Brown & McInnis. M. Judgment, 18 Dec., 1876. *v. Boyer & Dufencault.* M. Judgment, 18 Dec., 1876. Both cases were confirmed, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. The Chief Justice took no part in the *délibéré*, and was absent when the judgment was pronounced.

An insolvent may obtain delay from his creditors on condition of his giving security for one fourth of his debts, and he may without the concurrence of his creditors, agree with the surety that he will abstract from his estate a certain sum weekly to be placed at the credit of the surety, and to be used by him as a guarantee against loss. *Normand & Beausoleil.* M. Judgment reversing, 28 April, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk and Ramsay, JJ., dissenting. Rep. 2 Dec. d'A. 215.

Sale in contemplation of insolvency. Section 133 of the Insolvent Act of 1875 makes the sale, deposit, pledge, or transfer of any property, real or personal, *by any person*, null and void. Where a trader appears not to have had any capital, never took stock, or kept books and had no idea of his financial position at the time of his insolvency, and who a few months before his insolvency gave a property to his daughter in payment of an alleged debt it will be presumed that the transfer was made by him in contemplation of insolvency. And it will be incumbent on the daughter to show the origin of the debt, particularly where there is some evidence to show that she had no means of acquiring wealth sufficient to be her father's creditor to the extent of the alleged indebtedness, in extinction of which the property was given. *Paige et al. & Evans.* M. Judgment confirming, 26 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 4 Leg. News 130. 1 Dec. d'A. 352.

One Farmer, an hotel keeper, being largely indebted to the appellant, a Notarial Deed of Sale, duly registered, was passed between them, whereby Farmer sold to the Appellant, with right of redemption within three years, certain moveable and immoveable property, comprising the hotel and furniture, being the bulk of his estate, for a certain stated valuable consideration. Farmer remained in possession of the property under lease from Appellant, and continued to carry on his business as usual. About ten months afterwards he became bankrupt and the respondent was appointed his assignee. In the meantime Appellant had, with Farmer's consent, granted a lease of the moveables to Trihey and Johnson, in whose hands they were when respondent revendicated them as part of Farmer's insolvent estate. Trihey and Johnson did not contest, but the Appellant intervened and claimed the effects under the deed of sale above mentioned. The respondent, contesting the intervention, prayed to have the deed in question annulled and set aside as having been made in fraud of Farmer's creditors.

Under the circumstances there was no fraud or illegal preference, either within the provisions of the Insolvent Act or of the Civil Code.

Even were fraud disclosed, the Court could not, on such an issue, declare fraudulent and annul that part of the deed affecting the immoveables.

Such constructions must be given to the Insolvent Act in the matter of fraud as to leave creditors some latitude to exercise vigilance to secure their debts, and debtors hopeful and energetic to work out their salvation, if neither on the part of the one nor the

other there appears evident intention to defeat the remedies of creditors or obtain fraudulent preference in contemplation of insolvency.

Absence of delivery is only a presumption of fraud, and it may be rebutted by other presumptions equally strong. *Bell & Rickaby*. Judgment reversing 8 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Dorion, C. J., dis.

In the Supreme Court, it was held, reversing the decision of the Queens Bench, that there was sufficient evidence to prove that the object of the transaction was to defeat Farmer's creditors generally, and therefore the deeds of sale and lease of 19th January, 1875, were null and void under arts. 1033, (1) 1035, 1040 and 993 C. C., and sects. 86 and 88 of Insolvent Act of 1869 and sec. 3, subsec. 13 Insolvent Act 1875. 2 Rep. S. C. 560.

Where monies have been deposited from time to time in a Bank to the credit of A., of whom the Bank was creditor to an amount far exceeding the balance of such deposits, and on the understanding that such deposits were to enure to the benefit of the creditors of A. generally, B. and others cannot legally sue the Bank to recover

(1) A contract cannot be avoided unless it is made by the debtor with intent to defraud and will have the effect of injuring the creditor.

An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud. 1035 C. C.

No contract or payment can be avoided by reason of anything contained in this section at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof. If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of their appointment. 1040 C. C.

Fraud is a cause of nullity when the artifices practised by one party or with his knowledge are such that the other party would not have contracted without them. It is never presumed and must be proved. 993 C. C.

a proportion of such deposits, on the ground that a portion of said monies really belonged to B. and others, in the absence of any notice to, or knowledge by the Bank of the existence of any such right on the part of B. and others, whilst such deposits were being made. *La Banque Jacques Cartier & Giraldi et al.*, M. Judgment reversing 21 March, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 26 J. 110.

Where an action is brought by one creditor to recover back from another creditor what the latter has recovered by diligence from the insolvent, without fraud, the creditor bringing such action is only entitled to recover rateably from the other creditors. *La Banque Jacques Cartier & Beausoleil*, M. Judgment reversing 25 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 151. 4 Leg. News 116.

Where one of the reasons for taking out a writ of attachment is that the alleged insolvent has allowed an execution to go out against him, it is for him to explain this fact. *Blackwood & Wilson*, M. Judgment confirming 19 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

A writ of attachment will be set aside, if the affidavit does not state concisely and clearly the nature of the alleged indebtedness. *Perkins & Hutchins*, M. Judgment confirming March. 1877.

Fraud. – Imprisonment. — An action was brought against an Insolvent, under section 136 of the Insolvent Act of 1875, alleging twenty-six different purchases of goods with intent to defraud. but concluding with a single prayer for the imprisonment of the Defendant. *Held* (reversing the judgment of the Superior Court) that it was not necessary to charge each purchase as a distinct offence.

Where the Court finds the evidence insufficient to justify an order for imprisonment, the Plaintiff in such pro-

ceeding is nevertheless entitled to judgment for the debt if proved.

And the fact that during the time of making such purchases the insolvent has actually decreased his indebtedness to Plaintiff, rebuts the idea that in making these purchases the insolvent intended to defraud Plaintiff. *Caldwell & Macfarlane*, M. Judgment reversing 14 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 1 Leg. News 4, 22 J. 78.

Imprisonment for fraud.—To bring the insolvent within the terms of our Statute and subject to imprisonment for debt it must appear that he knew and believed himself to be unable to pay the said debt when he contracted it. that he concealed that fact from the Plaintiff with intent to defraud, and that he has not paid the debt. *Healey & The Delaware & W. Railroad Co.*, M. Judgment confirming 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

Effect of on lease.—Where an *adjudicataire* of an immoveable, under the Insolvent Act of 1875, leased by the insolvent for a fixed term, receives the rent payable under the lease from the tenant after the date of the adjudication, he thereby tacitly confirms the lease to the expiration of such term. *La Société de Construction Métropolitaine et les Commissaires d Ecoles Catholiques de la Cité de Montréal*, M. Judgment confirming, 14 June, 1879. Monk, Ramsay, Tessier, Cross, Sicotte, JJ. Rep. 24 J. 25. 2 Leg. News 205.

Saisie-Gagerie.—The Insolvent Act of 1875, sects. 78 and 125, having given a summary recourse to privileged and hypothecary creditors against property in the hands of the assignee, has taken away the right of the lessor to proceed by *saisie-gagerie* in the hands of the assignee. *Beausoleil & Frigon*, Q. Judgment reversing 4 Dec. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 70.

Lease.—The lessor of property occupied by the insolvent, who consents to an agreement retransferring to the

insolvent his whole estate, cannot hold the assignee liable for any diminution of the property garnishing the premises, and by which he suffers loss of rent. *Evans & Perkins*, M. Judgment confirming. 22 Nov., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

In order to terminate a lease of premises held by the insolvent it is necessary to notify the lessor of the resolution of the creditors to abandon the lease ; and a letter from the assignee telling the owner that the premises would not be required is insufficient. *Seybold & Evans.* M. Judgment confirming, 27 May, 1882.

Where a lessee who has promised to take a lease in writing becomes insolvent, without having done so, and the assignee assumes the lease, the court will not order him to take a lease in writing. *Morris & Court.* M. Judgment confirming, 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

A deed was passed to the following effect: " Les dits Levy et Bouchard " achetèrent les crédits de l'établisse- " ment pour la somme de mille qua- " rante deux piastres.

" La dite Dame Tremblay déclare " avoir loué, comme par les présentes " elle loue, pour quatre années entières " et consécutives, qui ont commencé à " courrir du vingt-huit décembre der- " nier, et se termineront le vingt-huit " décembre mil huit cent quatre-vingt- " deux, aux dits Levy et Bouchard, qui " l'acceptent, savoir :

" Tout le matériel de l'imprimerie et " l'achalandage du journal l'*Eclaireur*, " dont les dits Levy et Bouchard se " déclarent contents et satisfaits.

" Pour par eux en jouir pendant le " dit temps aux charges et conditions " qui suivent : à la charge de payer à " la dite Dame Tremblay un loyer de " huit piastres par semaine sur la som- " me de trois mille six cent piastres, " tel qu'il appert par la cédule ou état

" annexé aux présentes, après avoir été " signé des parties et du notaire sous- " signé *ne varietur*. Ce paiement de " huit piastres par semaine devra se " faire jusqu'à ce que la somme de six " cents piastres soit payée en déduc- " tion de celle mentionnée ci-dessus, et " ce paiement effectué, le loyer sera " diminué ou réduit d'un septième, " laissant un capital de trois mille " piastres, et le loyer diminuera à " proportion des paiements subséquents " qui seront faits par les dits Levy et " Bouchard, pour libérer la dite Dame " Tremblay des dettes mentionnées " dans la dite cédule. Et comme ces " dettes s'élèvent à la somme de deux " mille trois cent quatre-vingt douze " piastres et quarante-quatre centins, " tout paiement fait par les dits Levy " et Bouchard pour la somme de mille " quarante-deux piastres, comme il est " mentionné dans la cédule ci-annexée " et ci-dessus mentionnée, et ensuite " sur le prix de l'établissement fixé à " trois mille six cents piastres ; et les " dits Levy et Bouchard n'auront à " rendre compte ensuite à la dite Dame " Tremblay, ses héritiers et ayant cause, " que pour la balance de son capital.

" Si, à un moment quelconque de la " durée du bail, les dits Levy et Bou- " chard le désirent, ils pourront acheter " l'établissement pour le prix et somme " de trois mille six cents piastres, dé- " duction faite de tout ce qu'ils auront " payé à compte de ce montant. Tout " matériel qui sera acquis par les dits " Levy et Bouchard pour augmenter le " dit établissement suivra le sort du " matériel actuel, c'est-à-dire appar- " tiendra à la dite Dame Tremblay " tant que le matériel actuel sera sa " propriété, mais leur appartiendra dès " qu'ils auront acquis le reste au prix " ci-dessus mentionné." This deed is only a lease and did not convey the property to Levy & Bouchard, and it did not fall under the control of the assignee on their insolvency. *Walker & Connolly*. Q. Judgment confirming, 6 Feb., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Discharge of Insolvent.—Irregularities not sufficient to justify refusal of discharge if it appears Insolvent had made a *bona fide* assignment of his effects. *Gault et al, & Robertson*, M. Judgment 22 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross. JJ. Monk, Ramsay, JJ., dissenting; were of opinion that the *bona fides* of the assignment could only be established by regular proceedings, regular books and transactions and by truthfulness on the part of the insolvent.

A discharge in insolvency under the act of 1864 is not invalidated by the omission to state in the list of creditors, that the debt sought to be recovered was due to the creditor in her quality of tutrix. *Levy et al & Bareau*, M. Judgment confirming, 4 Febr., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 216. 2 Leg. News 53. 9 Rev. Leg. 695.

Under the repealed insolvent acts of 1875 and the acts amending the same, a deed of composition and discharge, which is not signed by the majority in number of those of the creditors for sums of $100 and upwards and who represent at least three fourths in value of the liabilities of the insolvent, will be set aside. *Sancer & Workman et al.*, M. Judgment confirming June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

NOTE.—There is also a motive to the judgment to the effect that there had been a fictitious augmentation of the number of creditors.

When a deed of composition and discharge has not been made in conformity with the insolvent act, it will not operate a discharge of the insolvent. In the case in point, the deed was not signed by the creditors, by the insolvent or by the assignee. It was never deposited in the hands of the assignee, and no notice of deposit was ever given. The Appellant was not a party to it. *Pelletier & Pouliot*, Q. Judgment amended without costs; 3rd Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice and Cross, J., would have given costs against Appellant.

The landlord of an insolvent, who has made a composition with his creditors and been discharged, and has had his estate returned to him, cannot maintain a personal action against the assignee for his rent. The assignee could not retain the estate after the deed of composition and discharge was executed. *Evans & Perkins.* M. Judgment confirming, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Assignee.—Where an action is instituted under section 45 of the Insolvent Act of 1869, and the action is dismissed, a new action cannot be instituted without a new authorization by the judge. *Murphy es qu. & Macintyre & al.* Q. Judgment confirming, 6 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Taschereau (H. T.) JJ.

The individual note of a partner of an insolvent firm, himself insolvent, and which has been entered in his statement of liabilities, cannot be recovered upon. And the fact that the note in suit is slightly different from the note mentioned in the statement may be explained by evidence. The *Exchange Bank of Canada & Evard.* M. Judgment confirming, 25 Nov. 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Intervention. — There was an agreement to pay R. $100. R. petitioned the Court to have an order to compel assignee to carry out arrangement, and the creditors intervened to oppose the order being granted. *Held* he had an interest to take such a proceeding and that it was regular. *Robertson & Molony.* Judgment confirming, 7 Sep. 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Private estates of partners of insolvent partnership. — The Consolidated Bank of Canada proved a claim for $153,464.62 against the insolvent estate of Mulholland & Baker, secured by the individual liability of Henry Mulholland & Joel C. Baker, two of the members of the firm, under a letter of guarantee of the 20th of January, 1876, this security valued in the claim at $75,000, and also by a transfer from M. & B. of two mortgages on the property of William P. Bartley for $25,000 each and valued at $45,000.

The Merchants' Bank proved its claim secured by a transfer of another mortgage on William P. Bartley's property for $25,000 and which the Bank valued at $13,000. On the claim made by the Consolidated Bank, Leslie, a creditor of Mulholland & Baker, contested the transfer made by M. & B. to the bank of the two mortgages against Bartley's property, and asked that this transfer be set aside as having been made in fraud of the creditors. On the claim of the Merchants' Bank, Leslie, on the same grounds, contested the transfer made to the Bank by M. & B. of their other mortgage on Wm. P. Bartley's property. Rodgers and others, also creditors of M. & B., contested the claim made by the Consolidated Bank, and the validity and effect of the letter of guarantee given by Henry Mulholland & Joel C. Baker on their private estates, as being in fraud of the creditors of the firm.

Held:—That as these contestations could not affect the claims of the Consolidated Bank and of the Merchants' Bank against the estate of M. & B., the contestants had shown no interest in their contestations, and that the creditors could only challenge the validity of the security held by the Banks by a direct action in the Superior Court, or by contesting the claims which might be made upon such security on the individual estates of Henry Mulholland and of Joel C. Baker, or of Wm. P. Bartley, respectively. *The Consolidated Bank of Canada & Leslie, The Merchants' Bank & Leslie & Rogers et al., & The Consolidated Bank of Canada.* M. Judgment, 25 Jan., 1881, confirming the first and second cases, and reversing the third. Sir A. A Dorion, C. J., Monk, Ramsay, Cross, Baby JJ. Rep. 1, Dec. d'A. 198.

Individual debt of partner. Interest. —The creditor of a hypothecary debt bearing interest due by one of the

partners, is entitled to be paid interest in full up to date of collocation out of the private estate of the partner, before the creditors of the firm are entitled to rank against the private estate. *The Consolidated Bank of Canada & Moat*, M. Judgment confirming, 31 Oct., 1883. Rep. 6 Leg. News 358. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ. The cases of the *Consolidated Bank & Workman et al., & The Consolidated Bank & The Merchants Bank* involved the same question and were confirmed. In the cross appeal of the Moat case the judgment was reformed, on a mere question of fact, whether the calculation included compound interest.

The interest to entitle a party to intervene in a suit must be actual. So where there was a demand calling on K. to assign owing to his having allowed his commercial paper to go to protest, and an action against K. & C. Bros. between whom it was alleged a partnership existed, C. Brothers will not be allowed to intervene. *Cook et al., & The Bank of Montreal.* Judgment confirming March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

NOTE.—Can there be an intervention of this sort in proceedings in insolvency?

Under the repealed Insolvent Act of 1869, an official assignee has no right, in his own name, to intervene in the affairs of an insolvent and to contend that the official assignee in possession of the estate is not qualified by law to act as such assignee.

That an assignee appointed under the act as official assignee for the district of Montreal, has a right to act as such assignee in the county of Hochelaga, being within the limits of such district, although there be an official assignee appointed for the county of Hochelaga. *Stewart & Vilbon*, M. Judgment reversing Sept., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The Appellant, assignee to the insolvent estate of the Morris Run Coal Company, filed a claim on the insolvent estate of the Moisic Iron Company for a balance of $330,214.79.

The Respondents contested this claim alleging that $36,129.18 was not due by the Moisic Iron Co., but by a former company;—that if the balance had been advanced, it should be imputed in payment of $250,900 of stock transferred as paid up stock by Wm. M. Molson to other parties, but in reality for the Morris Run Coal Company, and which was never paid.

Held:—1o. That out of the sum claimed, that of $36,129.18 was due by the Moisic Company, and not Moisic Iron Company.

2o. That the Morris Run Coal Co. owned $200,000 of the shares of the Moisic Iron Co. which had never been paid for, and that the balance of their claim must be imputed in payment of their stock. *Lynch & Henshaw.* M. Judgment confirming, 27 Jan., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 242.

Appeal.—An appeal instituted from a judgment in review, in a proceeding in insolvency, after the expiration of eight days from the rendering of the judgment, will be rejected on motion. *Graffitis & Sleepper.* Judgment, 21 Dec., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 76.

A local act laying down general rules as to appeal will control appeals in matters of insolvency. *Stewart es qua. & Angers*, M. judgment, March, 1874.

So where an act of the legislature of the Province of Quebec, passed in 1872 (36 Vic. c. 12, Sect. 3), limited the right of appeal in certain cases which had come to the Court of Review, it was held that this enactment applied to cases in insolvency, and that it was within the powers of the local legislature, as it contravened no act of Parliament relating to insolvency.

Appeal from judgment in Insolvent Court. Appellant did not put in security within eight days. On the tenth

day the judge refused to take the security, and the appeal was not further prosecuted, but the writ had issued. Motion to reject the appeal was granted. *Gibson & McArthur*, M. Judgment, 20 June, 1877.

A motion was made for special leave to appeal after the expiration of eight days from the time the judgment purported to be rendered in open Court, as required by the insolvent act 1875, Sect. 128. Affidavit setting forth that judgment purported to be rendered 4th July. On the 7th and 8th, 12th and 13th Appellant's counsel tried to obtain copy of judgment but it was not drawn. On 14th he applied at Prothonotary's office without any better result. The judge in Chambers then refused to take the bond. Leave to appeal refused. *The Canada Guarantee Co. & Bank of Hochelaga*, M, Judgment, September, 1881.

A rule to show cause why a writ of appeal should issue will be rejected, when the only cause for the rule was the mere fact that the delay for appealing under the Insolvent Act had expired, and unless there was a very clear case to shew that there was no appeal, and that the party was seeking to obtain an appeal, simply to frustrate the ends of justice. *Cotton & Ontario Bank*. M. Judgment, 22 Sept., 1877, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 22 J. 77.

Rule.—A rule to show cause why a writ of appeal should issue will be rejected, where the only cause for the rule was the mere fact that the delay for appealing under the insolvent act had expired. *Cotton & The Ontario Bank*, M. Judgment 22 Sep., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 22 J. 77.

The Court in its discretion will refuse leave to appeal from an order of a judge of the Superior Court in Chambers authorizing the assignee to open the door of the house of Appellant, an insolvent. *Whitlock & Tyre*, M. Judgment September 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Imputation. — The Appellant, assignee to the insolvent estate of the Morris Run Coal Company, filed a claim on the insolvent estate of the Moisic Iron Company for a balance of $330,214.79.

The Respondents contested this claim, alleging that $36,129.18 was not due by the Moisic Iron Company, but by a former company;—that if the balance had been advanced, it should be imputed in payment of $250,000 of stock transferred as paid up stock by Wm. M. Molson to other parties, but in reality for the Morris Run Coal Company, and which was never paid.

Held, that out of the sums claimed, that of $36,129.18 was due by the Moisic Company, and not by the Moisic Iron Company.

That the Morris Run Coal Company owned $200,000 of the stock of the Moisic Iron Company which had never been paid for, and that the balance of their claim must be imputed in payment of their stock. *Lynch & Henshaw et al.*, M. Judgment confirming, 27 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 242.

Marriage contract.—A right given to an intended wife by a contract of marriage, in case she *survive* her intended husband, to the legal interest of one-third of the property and assets belonging to his "*succession* and estates," cannot be exercised during the lifetime of the husband, against the property and estates assigned by him under the Insolvent Act of 1875. *Workman & Renny et al*, M. Judgment confirming, 5 Feb., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 324. 2 Leg. News 82.

Collocation. — A dividend payable under a dividend sheet, under the Insolvent Act of 1875, cannot be retained by the assignee of the estate by way of set-off or compensation against a debt due to the assignee by the creditor collocated, as endorser of certain notes given in payment of a

sale of the stock in trade of the insolvent by the assignee to another party. *Walker & Doutre*, M. Judgment reversing, 22 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep. 23 J. 317.

The sale of the estate *en bloc*, that is the estate moveable and immoveable, does not prevent the Sheriff from levying the tax of one per cent allowed under section 145 of the Insolvent Act of 1875, on so much of the amount of the sale as represents the real estate. *Evans & Chauveau*, M. Judgment confirming, 22 November, 1881. Sir A. A. Dorion, Ramsay, Tessier, Cross, Baby, JJ.

Under sect. 50, 34 Vic., c. 5, the bank does not forfeit its right of pledge by not selling the goods within six months. *The Molsons Bank & Lanaud*, M. Judgment confirming, 22 Nov., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 263. 2 Dec. d'A. 182.

A debtor against whose property a judgment has been registered, and who afterwards makes an assignment, and obtains back his estate by a composition with his creditors, in which he undertakes to pay the hypothecs on his property in full, cannot have the hypothec so registered set aside, at his own suit, on the ground that it is a fraud on his creditors. *Froste & Mc Keand*, M. Judgment reversing 22 June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, Sanborn, JJ., dis.

Where an official assignee under the Insolvent Act of 1875, has taken possession of an insolvent estate in that capacity, and subsequently the creditors have appointed him assignee to the estate without exacting any further security, and while acting as assignee of the creditors he makes default to account for monies of the estate, that the creditors have recourse upon the bond given for the due performance of his duties as official assignee. *Dansereau & Letourneux*, M. Judgment reversing, 27 May, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. N. L. R. T. Q. B. 357. 4 Dec. d'A. 220.

Mackedie & Mongeon. M. Judgment confirming, 27 May, 1882 Sir A. A. Dorion, C. J.

Merely involving questions of procedure. *Fraser & Darling*. Q. Judgment, 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J. dis. Reported 1 Dec. d'A. 217.

An insolvent husband who appears in a suit solely to authorize his wife to sue cannot be called on to give security for costs. *Barthe & Moreau et vir*. Q. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An insolvent may be condemned to three months imprisonment for a fraud, which does not amount to what is technically known in criminal law as a false pretence. M. *Buss & Wands*. Judgment confirming, 9 Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Capias by creditors of.— A *capias ad respondendum* may issue against a debtor after he has made an assignment under the insolvent Act of 1869. *Beaudoin & Roy et al.* M. Judgment confirming, 20 Sep., 1875. Dorion, C. J., Monk, Ramsay, Taschereau, Sanborn, JJ. Rep. 20 J. 308.

The forms given in the Insolvent Act of 1875 are deemed to be sufficient for the proceedings to which they apply. *Barbeau & Larochelle et al.* Q. Judgment reversing, 8 June, 1877. Dorion. C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 3 Q. L. R. 187.

Remedy against assignee.—An ordinary petitory action will not lie against an assignee for the recovery of real estate in his possession as assignee. *Fair & Désilets*. M. Judgment reversing. 26 Jan., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 84. 1 Dec. d'A. 212.

INSURANCE.—Insurance is a contract whereby one party, called the insurer or underwriter, undertakes for a valuable consideration, to indemnify the other called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event. 2468 C. C.

Where a party falsely pretending to be the agent of an Insurance Company grants a receipt for a policy, the company will not be bound unless it appears that the company has by its acts given an appearance of authority to the party acting in its name likely to deceive a prudent person. So where one Topwith, who had been in the employment of the company, but who had ceased to be employed by the company, and whose dismissal had been advertised in the newspapers, gave a receipt on an old form, in which he took a quality different from that he had when in the employment of the company, and different from that appearing in the printed form, such receipt will not be binding on the company. *The Victoria Insurance Co. & Ryan.* Judgment reversing, June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Fire, notice of cancellation.—In the case of an interim insurance by an agent, in the following words: "Received from Messrs. Tough & Wallace, Coaticooke (Post office, Coaticooke) the sum of $20, being the premium for an insurance to the extent of $2,500 on the property described in the application of this date numbered :—subject, however to the approval of the Board of Directors in Toronto, who shall have power to cancel this contract, at any time within thirty days from this date, by causing a notice to that effect to be mailed to the appellant at the above post office,"—that a notice by the company cancelling the contract, mailed to the applicants, at the post office, Toronto, within the thirty days, but not received in time for delivery by the post office at Coaticooke until after the fire, had not the effect of cancelling the insurance. *Tough et al. & The Provincial Insurance Co.* Judgment reversing, 22 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sicotte, JJ., Dorion, C. J., Sicotte, J. dis. Rep. 20 J. 168.

Where an interim receipt is given and the policy is not issued, the insured will not be bound by the conditions usually stipulated in policies of the company. So where the insured gives notice after the fire of another insurance, in time to allow of contribution and without fraud, such notice is sufficient. *Lafleur et al. & The Citizens Insurance Co.* M. Judgment reversing, 21 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Sir A. A. Dorion, C. J., Monk, J. dis. Rep. 22 J. 247. 1 Leg. News 518.

Where there is a condition in a policy that it shall be void unless the insured gives notice of subsequent insurance, and there was a subsequent insurance, of which notice was not given to the company, and the property insured was burned, the insured cannot recover on the policy. *Beausoleil & Mutual Canadian Fire Insurance Company.* Judgment confirming, 14 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Taschereau, JJ. Rep. 1 Leg. News 4.

A condition of a policy of the insurance to the effect, "that if the assured shall have or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon * * the policy," is not violated by an insurance by a creditor of the plaintiff insured to protect himself, and of which the insured had no notice. *The National Insurance Company & Trudel.* M. Judgment confirming, 27 May, 1882.

Promissory note.—Where an Insurance Company, without any reservation, accepts a promissory note of the insured for the amount of the premium, payment whereof is acknowledged by the policy to have been received, the failure of the insured to pay the note at maturity does not affect the validity of the insurance. *La Compagnie d'Assu-*

rance des Cultivateurs & Grammon. M. Judgment confirming, 17 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 82. 3 Leg. News 19.

An insurance company taking a note for the premium due and holding it afterwards and till the fire occurs, cannot pretend that the insurance is void. *Sheriden & The Ottawa Insurance Company.* M. Judgment reversing, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The agent of an insurance company cannot bind the company by agreeing to hold a party insured for board and lodging he was to furnish the agent. But where the agent made a note for the insured which he gave him to understand would be liquidated by the agent's board, and gave it to the company who held it as cash, the company will be liable in case of a loss by fire. *The Ottawa Agricultural Company & Bouthillier alias Boutiqué.* Judgment confirming, 22 September, 1874. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Cross, J. dis. Rep. 2 Leg. News 394.

Misdescription. Technical meaning of word.—Where the insured in his application for insurance described a building as "isolated," which it was in the ordinary sense of the term, that a printed note on the application *below* the signature of the insured, explaining "isolated" as meaning 100 feet from any building, did not bind the insured, he being in good faith and his attention not having been called to the note.

No bad faith being proved, the overvaluation did not vitiate the policy, and judgment was rendered for such sum as appeared to be supported by the evidence. *Pacaud & The Queen Insurance Company.* Judgment reversing, 21 Dec., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 111.

An insurance against fire was effected on a saw-mill, without disclosing the fact that the building contained a planing machine. *Held,* this was a material fact which it was incumbent on the insured to disclose, and the concealment of it rendered the insurance null and void. *Aitkin & The National Insurance Company.* Judgment confirming, 21 September, 1878. Dorion, C. J., Monk, Ramsay, Tessier Dunkin, JJ. Rep. 1 Leg. News 531.

Describing the building insured as a grocery, although it was really used as a tavern is not a misdescription. *The Canada Fire & Marine Insurance Co. & Parent,* Q. Judgment confirming, Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis.

New Trial.—Plaintiff sued under a policy covering goods in No. 319 St Paul street. The jury included in their verdict value of stock belonging to Plaintiff, which was stored in No. 315 adjoining.

Held, error under the action as brought, and new trial ordered. *Citizens Ins. Co. & Rolland.* Judgment reversing 14 Dec., 1878. Dorion, C. J., Monk, Ramsay, Cross, Tessier, JJ. Rep. 1 Leg. News 604.

Where a policy of Insurance was for goods on No. 119 St Paul street and the fire took place in No. 115 also in possession of the insured, and the jury finds for the insured, the verdict will be set aside and judgment will be entend up for Defendant. *The Citizens Insurance & Investment Co. & Lajoie,* M. Judgment reversing, 24 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Un usufruitier a un intérêt suffisant, comme tel, pour faire assurer contre les accidents par le feu, une maison dont il a l'usufruit, mais qu'en cas d'accident, il ne peut retirer de l'assureur que la valeur de l'intérêt qu'il prouve avoir. *St. Amand & La Compagnie d'Assurance de Québec,* Q. Judgment reversing 7 May, 1884. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. 14 Rev. Leg. 27.

Warranty.—A clause in a fire policy, that the house insured was "*à être lambrissée en brique,*" did not cons-

titute a warranty of a promissory nature that the house was to be immediately covered with brick, but merely expressed the intention of the insured to brick the building when circumstances would permit. Moreover, the insurance company having, after the expiration of a year, accepted a renewal premium while the house was still, to their knowledge, in the same state, could not take advantage of the words cited.

Where the value of the property is not easily arrived at and the evidence is conflicting, a claim will not usually be held to contain a fraudulent over-valuation, unless the amount demanded be about double the actual value. An apparent over-valuation of 20 per cent, was, in the present case, held not fraudulent. *The Northern Assurance Company & Provost*, M. Judgment confirming, 19 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 25 J. 218. 4 Leg. News 254 1 Dec. d'A. 278.

Where the over-valuation of stock is not fraudulent but merely the exaggeration of the value of wares by the manufacturer it will not render a policy of insurance void. *Holmes et al, & The Mutual Fire Insurance Co. of Stanstead & Sherbrooke Counties.* Judgment reversing 24 Nov.. 1849. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 84.

Where notice of double insurance is required by the conditions of a contract to insure, it is not necessary that such notice shall be in writing, unless it be so stipulated.

If there be no answer to an interrogatory put to the applicant for an insurer, the Court cannot presume that there was an answer and that such answer was a negative. *The Queen's Insurance Co. & Légaré.* Judgment confirming, 5 June 1876. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ. Monk, Sanborn, JJ., dis.

Condition of policy.—A condition of the policy may be waived by the action of the insurer. So where the insured was to give notice of double insurance, and failed to do so, but gave notice on his application after the loss and this was accepted by the company who agreed to settle, this is a waiver of the condition.

And the agreement to settle by the agent of the company, charged with the transaction, will bind the company, and this although by his instructions the company intended he should not settle. The error of the agent as to this meaning of his instructions must fall on the principal. *The Provincial Insurance Co. & Roy.* Judgment confirming, 6 March, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 643.

Acquiescence.—By the condition of a policy of fire insurance, the insured was required, on pain of forfeiture, to notify the company of any other insurance effected on the property. The company, after the fire, and after knowledge that other insurance had been effected, supplied forms for making claim, and joined in an arbitration to settle the amount of damage, and otherwise treated the contract as binding on the company. *Held*, that this was a waiver of all objections based on the condition requiring notice of other insurance. *La Fonderie de Joliette & The Stadacona Insurance Company.* M. Judgment reversing, 20 January, 1883. Rep. 6 Leg. News 279.

Une compagnie d'assurance ne peut, après qu'elle a commencé à s'entendre avec d'autres compagnies sur le montant proportionnel qu'elles auront chacune à payer, rejeter la réclamation de l'assuré sous prétexte de fraude, de fausses représentations, etc.

Dans tous les cas, ces moyens n'ont d'efficacité qu'en autant que, dans les conclusions, la nullité de la police d'assurance est demandée, sinon l'action contre l'assureur sera maintenue. *The Sovereign Fire Insurance Co. & Primeau et al.* Q. Judgment confirming, 8 October, 1885. Sir A. A. Dorion, C. J.,

Ramsay, Tessier, Cross, Baby, JJ. Rep. 4 Rev. Leg. 362.

Preliminary proof.—Waiver.— An insurance company joining in an arbitration as to amount of its liability without objection as to any irregularity in the preliminary proof, has waived its wright to object. *Canadian Mutual Fire Insurance Co., & Donovan.* M. Judgment confirming, 1 June, 1879. Dorion, C. J.. Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 229.

Where an insurance company agrees to settle a suit by paying a certain amount of the claim, it cannot afterwards repudiate this settlement except on the ground of error or of fraud. *Armstrong & The Royal Canadian Insurance Co.* Judgment confirming. Q. 7 Dec., 1880. Monk, Ramsay, Tessier, Crosss, McCord, JJ.

Notice of other insurance—Waiver. —By the condition of a policy of fire insurance, the insured was required, on pain of forfeiture, to notify the company of any other insurance effected on the property. The company, after fire, and after knowledge that other insurance had been effected, supplied forms for making claim, and joined in an arbitration to settle the amount of damage, and otherwise treated the contract as binding on the company. *Held*, that this was a waiver of all objections based on the condition requiring notice of other insuranc. *Joliette Foundry & The Stadacona Assurance Co.* M. Judgment reversing, 20 Jan., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

Creditor paid by—A creditor who has insured property hypothecated for the security of a debt due to him, and who has been paid in part by the receipt of the insurance money from the Insurance Company, is not entitled to recover from his debtor more than the balance due, including the premiums paid by him and interest thereon. *Archambault & Lamère.* M. Judgment reforming, 19 Jan., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 26 J. 236, 5 L. N. 204. 2 Dec. d'A. 97.

Marine—Evidence of unseaworthiness.—It is a warranty of the insured that the ship is seaworthy at the time the risk begins. If a vessel insured at M., shortly afterwards receives cargo, and then for the first time shows weakness, it will be presumed she was unseaworthy at M. if no storm or other accident has occurred between M. and the place she took in cargo; and this more particularly if it be proved that she struck a rock a little before reaching M. *Leduc & The Western Assurance Co.* M. Judgment confirming, 3 Feb., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Ramsay, J., dissenting without controverting the principles enunciated in the judgment, was of opinion that the evidence failed to establish any injury to the ship by striking a rock before reaching M., that on the contrary the ship appeared to be seaworthy on reaching M. and also on leaving M., that she took in cargo at Cowe Bay and was wrecked in a storm afterwards. Rep. 3 Leg. News 124.

When a vessel is seaworthy at the port of departure named in a marine policy, and becomes unseaworthy afterwards by striking on a rock during the voyage, the insurance risk attached from the time she left port.

Under the sue and labor clause in the policy, the assured had a right to recover the proportion of the cost of repairs caused by striking on said rock, which the value of the vessel bore to the sum insured, in addition to the sum insured, the vessel having been totally wrecked subsequently to the making of said repairs. *Leduc & The Western Assurance Co.* M. Judgment reversing, 26 Jan., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 25 J. 280. 1 Dec. d'A. 273.

The stipulation in a policy of insurance that insurance is to take place from the time the goods are put on board is valid.

A vessel that springs a leak on leaving port, without any known cause to explain it, will be presumed to have been unseaworthy when she took the cargo on board. *Leroux & The Merchants Insurance Co.* M. Judgment confirming, 6 March, 1882. Monk, Ramsay, Cross, Baby, JJ..

Dans une action pour perte totale sur police d'assurance maritime, le Demandeur peut réussir pour une perte partielle. *The Merchants Marine Insurance Co. & Ross*, Q. Judgment confirming, 8 Oct., 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby ,JJ. Rep. 10 L. R. 237.

Accident in port. Sea-worthiness.—If a vessel be sea-worthy at the time a marine insurance is effected, and becomes unsea-worthy shortly after by the fault of those in charge of the vessel, the insurance will not be rendered void. *Cross & The British America Insurance Co. & al.* M. Judgment confirming, 22 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk J. dis. Rep. 22 J. 10.

Question of evidence. *Leduc & The Western Assurance Co.* M. Judgment confirming, 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay and Tessier, JJ. dissenting. Rep. 3 Leg. News 124.

Art. 2544 C. C. does not absolutely require that notice of abandonment should be in writing. It must be explicit and contain the ground of abandonment.

Where the agent of the company on a verbal notice takes charge of the cargo declared by the insured to be valueless, the insurer cannot afterwards pretend that there was no abandonment. *The Western Insurance Co. & Pearson.* Judgment confirming, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

There was an express warranty in a policy of insurance that a sailing ship should "go out" in tow. The evidence showed that the ship went out from her berth in tow to where she could navigate in the river St. Lawrence. The jury found that the ship had complied with the condition. The Court refused to set the verdict aside. *The British America Assurance Co. & Connolly.* Judgment confirming, 5 June, 1877, Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

NOTE. — A case bearing the same name and raising the same question was tried by jury, and they arrived as a matter of fact at the same conclusion as did the majority of the Court of Queen's Bench.

Warranty that vessel should "go out in tow."—Where there is no evidence to show any technical meaning to these words or any special usage of the port it will be considered that the warranty will be complied with, if the vessel goes out in tow, from its berth into the stream where it can be navigated. *Connolly & The Provincial Insurance Company.* Judgment reversing, 22 Dec., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk and Cross, JJ. dis., Leg. 1 News 33. This judgment went in appeal to the Supreme Court, where it was reversed, 12 Dec., 1879, the following reasons being expressed: *Held*, (Fournier and Henry, JJ., dissenting,) that the words "from *Quebec* to *Greenock*, vessel to go out in tow," meant that she was to go out in tow from the limits of the harbour of *Quebec* on said voyage, and the towing from the loading berth to another port of the harbour was not a compliance with the warranty.

Per Ritchie, C. J.: The question in this case was not, if the vessel had gone out in tow, but how far she should have been towed in order to comply with the warranty; the determination of this latter question being dependent on several considerations, such as the lateness of the season, the direction and force of the wind, and the state of the weather, and possibly the usage and custom of the port of *Quebec*, if any existed in relation thereto.

Per Gwynne, J. : The evidence

established the existence of a usage to tow down the river as far as might be deemed necessary, having regard to the state of the wind and weather, sometimes beyond the *Traverse*, but ordinarily, at the late departure of the plaintiff's vessel, at least as far as the *Traverse*. Rep. 5 Sup. C. R. 258.

Fire.—Appellant lent money to T. who sold him his property with *faculté de remeré*. T. then insured but being apprehensive of the title granted to S., he notified the Insurance Company of the whole transaction, and they told him to insure and transfer policy to S. the appellant, which was done. *Held*, that there was an insurable interest, and that there was no concealment or fraud. *Sheridan & Ottawa Agricultural Ins. Co.* Judgment reversing, 14 June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where the loss under a fire insurance of goods is made payable to a party other than the person who effects the insurance, and such third party becomes owner of the goods by a transfer to him of the warehouse receipt of such goods, such third party becomes thereby the party assured, and can, therefore, legally make all necessary preliminary proofs of loss.

In this particular instance the proof of loss was not satisfactorily established. *Stanton & The Home Insurance Co.* M. Judgment confirming, 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 38, 2 Leg. News 238.

Where a fire policy, taken out by the owner of real property, declares that the loss, if any, is payable to certain persons named "as mortgagees to the extent of their claims," such persons become thereby the parties assured to the extent of their interest as mortgagees and their rights and interests cannot be destroyed or impaired by any act of the owner of the property.

The preliminary proofs of loss made by the Appellants were sufficient, and that the Respondent waived any right to complain of any delay in furnishing the same. *Black et al. & The National Insurance Company.* M. Judgment reversing, 20 Dec. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Sicotte JJ. Monk & Ramsay, JJ., dis. Rep. 24 J. 65. 3 Leg. News 29.

The holder of a warehouse receipt, must show the existence of the goods said to be destroyed by fire, if it be denied, or he cannot recover on his policy of Insurance. *Hood & The Western Insurance Co.* M. Judgment confirming, 19 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Change of possession.—A loss under a fire policy effected by an official assignee under the Insolvent Act of 1875, to whom an assignment had been made under the Act, is recoverable by the assignee subsequently elected by the creditors, notwithstanding that in the policy the assured is described simply as "Official Assignee," the loss being made payable to the estate so assigned to him.

Such loss may be so recovered, notwithstanding that the fire shall have occurred after the appointment had not been specially communicated to the Insurance Company before the fire.

Under the circumstances of this case, there was not any charge either of ownership or possession. *Elliot & The National Insurance Co.* Judgment reversing, 18 Sept. 1878. Dorion, C. J., Monk, Ramsay, Tessier, Dunkin, JJ. Rep. 23 J. 12, 9 Rev. Leg. 615. 1 Leg. News 450.

Life Insurance.—A policy of Life Insurance is a contract of indemnity, and there must be an interest. *Lemieux & The Ætna Life Insurance Co.* Judgment confirming, 14 Dec. 1878.

Where a party insures his life and conceals material facts upon which he has been questioned, the policy will be annulled.

That where there is no insurable interest in the party effecting the insurance, the policy will be void. And so where L. insured the life of C., in C's name, and paid the premiums and immediately took over the policy, without consideration, the policy will be void. *Michaud et al. & The British Medical Association.* Judgment confirming, Q. 5 June 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

A creditor obtained an insurance on the life of his debtor, for an amount greatly in excess of his real interest. Both the creditor and the agent of the insurance company were ignorant that such extra insurance was invalid. *Held* that the insured was entitled to recover the excess of premium paid on the larger sum, and that in the absence of proof to the contrary, the Court would assume that the premium for the smaller sum was proportional to that paid for the larger sum. *The London & Lancashire Life Assurance Company & Lapierre.* Judgment confirming, M. 21 Sept. 1878. Rep. 1 Leg. News 506.

The provisions contained in the Act 29 Vict., c. 17, whereby insurances upon the lives of husbands may be effected or indorsed in favor of their wives and children, are in the nature of *alimens*, and the insurance money due under policies made under said Act is free from the claims of the creditors of both the husband and wife. *Filbon & Marsouin.* Judgment confirming, 22 June, 1874. Taschereau, Ramsay, Sanborn, Loranger JJ. Ramsay, J. dis. Rep. 18 J. 249.

Canadian holders of policies in a foreign company styled mutual, although not really so, have a special claim for indemnity out of the deposit in the hands of Government (46 Vic. c. 42) in case of the insolvency of the foreign company. *Fish & Mills.* M. Judgment confirming, 27 November, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.,

Mutual.—*Double Insurance.*—An insurer in a mutual insurance company is bound by the conditions endorsed on the policy; and the officers of the company cannot dispense with the execution (by members insured) of their charter obligation, and the provisions adopted by its members generally for their mutual protection in and by their charter and policies. *Harvey et al. & La Cie d'assurance Mutuelle d'Hochelaga.* M. Judgment confirming, 15 Feb. 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Insurance of fidelity and against negligence.—An employee left a large sum of money belonging to his employers in open bags in his room, while he went to lunch, without availing himself of the means of safe-keeping provided for him. On his return from lunch the money had disappeared. *Held*, that he was guilty of negligence so as to constitute a breach of a guarantee policy, the conditions of which was that he should diligently and faithfully discharge his duty as employee. *The Citizens Insurance Co. & The Grand Trunk Railway of Canada.* Judgment confirming, 17 Sep. 1880. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 311.

Assignee.—Les syndics-conjoints de l'Assurance Agricole du Canada ont été duement nommés en vertu du chapitre 38 de l'Acte 41 Vict. (Can.), et qu'ils sont revêtus de tous les pouvoirs appartenant à des syndics officiels de même que s'ils avaient été nommés en vertu de l'Acte de faillite de 1875 et ses amendements.

En l'absence de dispositions spéciales, le fait qu'un avis contenant les demandes de versements, a été mis à la poste à l'adresse des actionnaires sera une preuve suffisante de la demande de ces versements. *Ross et al & Converse.* M. Judgment reversing, 25 Jan. 1883. Rep. 6 Leg. News 67.

Le propriétaire enregistré d'un navire est en droit de réclamer, après la perte de ce navire, le montant d'une police d'assurance prise sur le dit navire par un agent d'affaires agissant au nom du propriétaire et pour le seul avantage

de celui-ci. *The Anchor Marine Insurance Co. & Allen.* Q. Judgment confirming, 6 May, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 449.

A foreign insurance company insured the life of one Charlebois. The application for the policy set forth that: "It is hereby agreed that this application shall form the basis of the contract of Insurance herein applied for, and the same form part of said contract as if therein recited, and that all answers and *declarations* contained in this application are and shall be taken to be strict warranties *and* that " should the applicant become as to habits as far different from the condition in which he is represented to be as to increase the risk on the life insured *** the policy shall become null and void, and the payments thereon shall be forfeited." The policy which issued on this application provided that " if any of the *declarations* or *statements* made in this application for the (upon the faith of which the policy is issued) shall be found in any respect untrue * * the policy shall be null and void." *Held* that the clause of the application relating to the change of habits of the insured was a warranty that the insured would not alter his habits, and that it was proved that the insured had become so intemperate since the policy that the risk of the insurer was considerably increased. *Boyle & The Phœnix Mutual Life Insurance Company of Hartford.* M. Judgment confirming, 21 September, 1886. Sir A. A. Dorion C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Baby JJ. dis. were of opinion that there was no express warranty, for the alteration of the habits of insured was neither an *answer* nor a *declaration* nor a *statement*, and that it could not be " untrue; "—that the stipulation that the policy should be void in case of the insured acquiring intemperate habits was valid, but that the insurer having received money from the insured without question, and having only advanced the objection at the moment he was called upon to pay, made the position of the company Respondent unfavourable,and necessitated precise and conclusive testimony,—that such testimony did not exist,—that the evidence that the insured's life was shortened by his intemperate habits was disproved,—that on the contrary the insured died of heart-disease which had been known to exist before it was pretended that the insured had acquired the intemperate habits attributed to him.

INTERDICTION.—A person who is of full age or an emancipated minor, who is in an habitual state of imbecility, insanity or madness, must be interdicted, even though he has lucid intervals. 325 C. C.

Persons who commit acts of prodigality, which give reason to fear that they will dissipate the whole of their property are also to be interdicted. 326 C. C.

The interdiction of drunkards is provided for by Q. 33 Vic. c. 42 and 43 Vic.

The curator to a person interdicted cannot appeal from a judgment, until he is authorized by the judge, or the prothonotary, on the advice of a family council.

In such case the Court of Appeal will not grant leave to execute a judgment for aliments, notwithstanding the appeal. *Clément & Frances.* M. Judgment rejecting appeal, 26 September, 1833. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Reported 6 Leg. News 325.

A judgment of interdiction which has been pronounced by the Prothonotary, is subject to revision by the Court only, and not by a judge in chambers. *Clément & Francis.* M. Judgment reversing, 30 June, 1881. Sir A. A. Dorion, C. J , Monk, Ramsay, Cross, Baby, JJ. Reported 5 Leg. News 301. 1 Dec. d'A. 346.

When persons assume the duties of curator to an interdicted person and the control of his property, they will be responsible for their administration,

and accountable as if they had been regularly named curator to the interdict.

Where relatives of the interdicted persons make an act *d'accord* by which they agree to maintain such interdicted person for his revenues, which are not large, nor more than necessary for his support, the heirs of the person interdicted will be bound thereby. *Corbeil & St-Aubin et al.*. M. Judgment reversing, 26 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

INTEREST ON MONEY. — The damages resulting from delay in the payment of money to which the debtor is liable consist only of interest at the rate legally agreed upon by the parties, or in the absence of such agreement at the rate fixed by law. These damages are due without the creditor being obliged to prove any loss.

They are due from the day of the default only, except in the cases where by law they are due from the nature of the obligation.

This article does not affect the special rules applicable to bills of exchange and contracts of suretyship. 1077 C. C.

Interest accrued from capital sums also bears interest :

1. When there is a special agreement to that effect ;

2. When in any action brought such new interest is specially demanded ;

3. When a tutor has received or ought to have received interest upon the moneys of his pupil, and has failed to invest it within the term prescribed by law. 1078 C. C.

The mandator has a direct action against his mandatory for monies collected and not paid over, and the mandator is not obliged to resort to the *actio mandati*.

In the absence of any allegation or proof to the contrary, the act of a mandatory in collecting money for his principal, will be held to be a non-commercial act.

The prescription of thirty years applies to the above case where a mandatory collected monies for his mandator.

The mandator will be entitled to claim both principal and interest from his mandatory.

Joseph & Philips. M. Judgment confirming, 22 March, 1875. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 162.

Loss of interest may be a measure of damages. *Patrick & Compagnie des Moulins à vapeur de Pierreville.* Q. Judgment confirming, 7 Dec. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

The Corporation of the City of Montreal, in exacting under threat of execution, the assessment imposed by an assessment roll, apparently clothed with all legal formalities, but which was subsequently set aside by the Courts, was not in " bad faith within the meaning of Art 1049 C. C., (1) and therefore was not bound to pay interest on the money from the time of receiving it, but only from the date of the action *en répétition.*' *Wilson et al. & The city of Montreal.* M. Judgment confirming, 19 June, 1880. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 24 J. 222, 3 Leg. News 282.

If interest does not run by the contract, and where the debt is only payable on demand, and there is no demand before action brought, and the defendant by his plea confesses judgment

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(1) If the person receiving be in bad faith he is bound to restore the sum paid or thing received, with interest and profits which it ought to have produced from the time of receiving it or from the time that his bad faith began.

and tenders the amount, the Plaintiff is not entitled to interest or costs. *Dorion & Benoit.* M. Judgment reversing, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross JJ. Reported 2 Leg. News 171.

Interest is the measure of action. So where Samuel S. Campbell gave a mortgage for $25000 to Lucy Jane Stevens, his wife, for the price of the stock in trade belonging to her in a partnership which had existed between her and one Charles Hagar, including from $10,000 to $11,000 interest on said price. Campbell, subsequently, gave a mortgage on the same property, for $15,000 to Walter Bonnell, which mortgage, Bonnell transferred to the Appellant as collateral security for a note of $26,000, discounted on the same day, the bank receiving at the same time other collaterals to secure the payment of the note.

Campbell subsequently gave a mortgage to Brackley Shaw for $45,000.

Lucy Jane Stevens became a party to the deed and granted to Shaw a priority of hypothec over her own.

The action is by the Appellants as creditors under the transfer of the hypothec from Bonnell, to set aside and annul, as illegal and void, the hypothec by Campbell to his wife, and the priority given by the latter to Shaw.

Held:—That as the Appellant had been paid the full amount of the note of $26,000 for which the hypothec of $15,000 had been transferred as collateral security only, the Appellant had no interest to contest the hypothec given by the latter to Shaw.

The other questions raised were not decided by the Court.

But Dorion, C. J., held the hypothec given by Campbell to his wife was, under the circumstances, a transaction forbidden between husband and wife, and therefore null and void; that the transfer by Bonnell to the Bank of an hypothec to secure a note discounted on the same day, was also null and void. as being contrary to the banking act 34 Vict. c. 5, s. 40, which forbids banks to advance on the security of real estate. *The Bank of Toronto & Perkins et al.* M. Judgment confirming, 25 April, 1881. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Baby JJ. Rep. 1 Dec. d'A. 357.

By the artifice of a debtor the Sheriff's officer was induced to take in execution and sell property not belonging to the debtor and part of which was the property of the seizing creditor. In an action *en nullité de décret*, it was held that the seizing creditor had an interest to set aside the sale of her own property, but that she had no interest to set aside what had been illegally and fraudulently sold in her suit. *Clark & Ralph et al.* Q. Judgment confirming, 6 May, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier. Cross, JJ. Ramsay, J. dissenting thought the seizing creditor had an interest to set aside a sale of land thus wrongfully seized and sold.

INTERLOCUTORY JUDGMENT.—A report of *Experts* is no bar to the adduction of evidence generally in the case. *Scott et al. & Payette.* M. Judgment reversing, 22 Sep. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 24 J. 141, 2 Leg. News 335.

INTERPRETATION OF DEED.—Where creditors agree, by a composition deed (not executed under the Insolvent Act), to release their debtor absolutely, and the deed provides that, in case the debtor go or be forced into insolvency under the Act, the claims of the creditors should revive in full, but that the creditors signing the deed should in that case enter into a new composition deed under the Act, such creditors could not be compelled, in case of subsequent insolvency under the Act, and the execution of a new deed of composition under the Act, to accept a composition on the mere balance then remaining unpaid to them of the original composition, but, on the contrary, would be entitled to rank for the full

balance unpaid on the original claims. *Rafter & Morison.* M. Judgment confirming, 21 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Dunkin, JJ., Dunkin, J. dis. Rep. 23 J. 297.

Donation by father and mother to their son. In the deed there was the following stipulation :

" En ensuite il prendra possession " comme il sera dit ci-après et alors il " l'ensemencera et la cultivera à moi- " tié, d'après l'ordinaire des baux à " ferme, les parties fournissant moi- " tié de la semence, les grains par- " tagés au minot, les foins au fourrage " à la tasserie, et le *pacage aussi par* " *moitié*, — en conséquence le dona- " taire laissera aux donateurs leur vie " durante, après les dix ans, pendant " lesquels les donateurs se réservent à " titre de constitut et précaire la jouis- " sance et usufruit de cet immeuble, la " moitié de tous les grains et légumes, " foins et fourrages, et la terre *sera* " *aussi alors ensemencée d'après les ins-* " *tructions des donateurs, et le pacage* " *sera réglé par moitié entre les par-* " *ties.* "

The only question of importance raised by this appeal is whether the word " *le pacage aussi par moitié*," and also the words "*et le pacage sera réglé par moitié entre les parties*," should be interpreted to mean that the parties were to enjoy and use the *pacage* each for a half, or that they were to divide its value. The Court was of opinion that the deed stipulated a common use each for a half of the pasture by the parties, as it should be determined between them. *Delage & Delage.* M. Judgment confirming, 22 March, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier Cross, Baby, JJ.

During the community existing between Sir E. P. Taché, a considerable sum was expended from the community on houses, propres of the wife. After the death of Sir E. P. Taché, an inventory of the community was made, and the amount so expended was established. Lady Taché, by will constituted her sons her universal legatees,

and left special legacies to her five daughters, on condition that they should renounce to their share in the succession. Fourteen years later, Lady Taché made a codicil by which she left her savings (meaning her savings after the death of her husband) " après le règlement des dettes de succession " to be divided equally between her daughters.

Held :—1. That the sum expended from the monies of the community on the propres of the wife was, under C. C. 1304, a charge on the wife's share of the community, but the sons being made universal legatees by the will, the effect was to make them creditors and debtors of the sum in question, and the obligation was extinguished by confusion.

2. That the codicil did not revive the claim of the community against the wife's share for the expenditure on the progres, as a debt due to the universal legatees. In referring to the " règlement des dettes de succession " in the codicil, the wife meant to include only such debts as she had contracted personally after the husband's death.

Held : (by Ramsay & Baby, JJ. diss), 1. that the bequest by the codicil was of certain economies made by the testatrix, and that as she only possessed her share of the community formerly existing between her and her husband less the *récompenses* with which such share was chargeable by law, no portion of such recompense could be an economy of the testatrix. 2. That there was no confusion of the qualities of debtor and creditor in the persons of the sons as regards the amount in question for there was no debt and no credit to be confused. *Taché et al. & Taché.* Q. Judgment confirming, 5 February, 1886. Monk, Tessier, Cross, Baby, JJ. Ramsay, Baby, JJ. dissenting. Rep. 12 Q. L. R. 45, 14 Rev. Leg. 257. 9 Leg. News 338.

Lorsqu'il a été stipulé que l'une des partie pourra construire certains travaux sous la réserve qu'au bout de vingt ans, et après un avis de six mois

donné dans les douze mois qui précèderont l'expiration de la vingtième année, l'autre partie pourra s'approprier les travaux alors faits en en payant la valeur, après estimation par arbitres,—le défaut par la première partie de nommer son arbitre pour procéder à l'évaluation susdite, après avis donné en temps opportun, ne peut autoriser l'autre partie à procéder seule, par son arbitre, à la dite estimation.

Telle estimation faite par une seule partie ne peut lier l'autre partie, qui n'a pas concouru, ainsi qu'elle était en droit de le faire.

Dans ces circonstances, le montant fixé par l'arbitre comme étant la valeur des travaux, constructions, etc., que pouvaient acquérir l'une des parties, après vingt ans, ne peut être offert à l'autre partie de manière à permettre à celle-là de s'emparer des dits travaux, constructions, etc. *La Corporation de Québec & La Cie du chemin de fer des rues de Québec.* Q. Judgment modified so as to reserve the Appellants right to sue again, 6 May, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Baby, JJ., dissented as to the sufficiency of the notice given by the Corporation; the majority of the Court having *held*: that the stipulation that the Corporation of Quebec "at the expiration of twenty years" may, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of the said railway, &c., is sufficiently complied with by a notice given within the last year, but so late as not to allow six months to elapse without running into the twenty-first year.

One Dulac being indebted to the Appellant procured for him from one Fortier an obligation as if Fortier was personally the debtor of the Appellant. Dulac having afterwards paid Appellant the latter transferred him Fortier's obligation, and he (Dulac) transferred his to the Respondent, who brought suit and recovered judgment for the amount of the same against the Appellant.

Held:—That under the circumstances the Respondent had no action against the Appellant for the amount of the transfer, even if he obtained it for value, his action, if any he had, being against Fortier or Dulac. *Roy & Lepage.* Q. Judgment reversing, 8 October, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11 Q. L. R. 204, 14 Rev. Leg. 61.

Conventions vagues ou non formellement arrêtées. Le silence à cet égard équivaut-il à un acquiescement?—*Quantum meruit. The St Lawrence Steam Navigation Co. & Lamay.* M. Judgment confirming, 25 November, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 29 J. 293.

Bezendine & Denis. M. Judgment confirming, 3 Feb., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

INTERVENTION.—*v.* ACTION—GARDIEN—INSOLVENCY.

Every person interested in the event of a pending suit is entitled to be admitted a party thereto, in order to maintain his rights. 154 C. C. P.

Case en délibéré.—The draft of judgment in a case, as paraphed by the judge, is the true record of such judgment, and cannot be contradicted by oral testimony offered in support of a *requête civile* attacking the correctness of the entries thereon so paraphed by the judge.

A judgment so recorded cannot be set aside on a *requête civile* by another judge of the same Court, on the ground of error in such record.

According to the evidence, there was really no error in the present instance. *Holmes & Carter.* M. Judgment confirming, 21 September 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ.

INVENTORY.—*v.* PARTAGE.

JOINT & SEVERAL.—An exception *dilatoire* will not be maintained which demands that the action against a joint and several debtors shall be suspended until the Plaintiff has put all the other joint and several debtors into the case. *Ross & Ross.* Q. Judgment reversing, 7 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk J. dis. Rep. 14 Rev. Leg. 1.

Where the judgment creditor of a joint and several debt, abandons his recourse against one of the joint and several debtors, under reservation of all his claims against the other parties, he does not renounce his right to execute his judgment for the whole amount, and the opposition of one of the other debtors will be dismissed. *Whitfield & The Merchants Bank of Canada.* M. Judgment confirming, 21 May, 1884. Monk, Ramsay, Cross, Baby, JJ.

JOINT ADVENTURE. — *v.* ACCOUNT—PARTNERSHIP.

JOINT-STOCK CO. — *v.* CORPORATIONS.

The production of a certificate of the Secretary of a joint stock company that the Defendant had subscribed five shares of the company is *prima facie* evidence of the fact, under the terms of the statute 37 Vic. c. 94, Sec. 5. *The Stadacona Fire Insurance Co. & Cabana.* M. Judgment reversing, 6 March, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Monk, Tessier, JJ., dissenting. Reported 2 Dec. d'A. 380.

Transfer of shares.—Mandamus by a party pretending to hold shares in joint stock to compel the company to transfer said shares to Petitioner's name.

Held, that the company could not be compelled to make good a subscription of stock which had not been accepted by the subscriber in its books, according to the Incorporation and by-laws of the Company until the whole capital stock had been distributed to others. *Hart & The Montreal Manufacturing Company.* M. Judgment confirming, 14 Dec. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A purchaser *subsequently to* incorporation, of shares subscribed *prior* to incorporation, and who has paid a call after his purchase, is estopped from contesting the validity of the original subscription. *Macdougall et al & The Union Navigation Co.* M. Judgment confirming, 16 March, 1877. Monk, Sanborn, Tessier, JJ. Rep. 21 J.. 63.

Shareholder.—Where a person has subscribed for shares in the capital stock of a company which is being organized, and has assumed the position of a shareholder, and has paid a portion of the calls made from time to time on stock, he cannot set up alleged irregularities in the original organization of the company as a valid reason for avoiding payment of the remainder of the calls. *The Windsor Hotel Co. & Lewis et al.* M. Judgment reversing, 29 Sep., 1881. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, Baby JJ. Rep. 26 J. 29, 4 Leg. News 331.

Those persons only who are mentioned in the letters patent incorporating the company as shareholders and promoters prior to that time if not mentioned therein are not liable as contributories. *Rascony & La Compagnie de Navigation Union.* M. Judgment reversing, 18 Sep. 1878. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 133. 1 Leg. News 494.

Action for calls.—An agreement be-

tween a promoter of a company and a subscriber for shares, that the latter shall pay for his stock in services, will not bind the company.

Even if the shares of those who subscribed before the respondent were reduced, without his knowledge, after he subscribed, yet if he, after obtaining knowledge of that fact, did not immediately repudiate his stock, but, on the contrary, paid a first instalment thereon, and took an active part, both as solicitor and shareholder, in promoting the affairs of the company, he will be liable to pay the calls on the stock held by him as they are made by the Directors. *The National Insurance & Hatton.* M. Judgment reversing, 21 June, 1879, Dorion C. J., Monk, Ramsay, Tessier, Cross JJ., Rep. 24 J. 26, 2 Leg. News 238.

It is no answer to an action for calls, on subscribed stock of a joint-stock company to say that the Defendant was given to undertand by those who sollicited him to become a share-holder that he would pay for his stock in supplies to the company. *Christin & The Union Navigation Co.* M. Judgment confirming, 20 November 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ.

Action for calls.—A bank took 150 shares of stock of the nominal value of $100 per share, on which 45 per cent was paid up, as collateral security for advances. *Held*, the Bank was not responsible for calls on shares so held. *The Railway & Newspaper Advertising Co. & The Molsons Bank.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 207.

Where a share-holder has transferred stock not fully paid to a solvent party, all the calls then due being paid, and the transfer has been acquiesced in by the company, the original stock-holder cannot afterwards be called upon to make good the remainining calls. *Ross et al & Baribault.* Q. Judgment confirming, 7 May, 1888. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

Une compagnie constituée en corporation ne peut, à moins d'y être autorisée par sa charte, ou par une loi spéciale, ni racheter ses actions, ni réduire son capital, ni accepter les remises d'actions (*surrenders*) que lui font ses actionnaires, de manière à les libérer tous, ou en partie, de leur responsabilité vis-à-vis de la compagnie ; que toutes ces opérations sont radicalement nulles, *ultrà vires*, et ne déchargent pas les actionnaires de l'obligation de payer le montant de leurs actions.

Dans l'espèce, il n'était pas nécessaire de mettre en cause Goff, le cessionnaire du défendeur intimé. *Ross et at. & Dusablon.* Q. Judgment reversing, 8 October, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ. Rep. 10 Q. L. R. 74.

Les syndics-conjoints de l'Assurance Agricole du Canada ont été duement nommés en vertu du chapitre 38 de l'Acte 41 Vict., (Can.) et qu ils sont revêtus de tous les pouvoirs appartenant à des syndics officiels, de même que s'ils avaient été nommés en vertu de l'acte de faillite de 1875 et ses amendements.

En l'absence de dispositions spéciales, le fait qu'un avis contenant les demandes de versement, a été mis à la poste à l'adresse des actionnaires, sera une preuve suffisante de la demande de ces versements. *Ross et al. & Converse.* M. Judgment reversing, 25 Jan., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ. Rep. 6 Leg. News 67.

Respondent was sued for the amount of his subscription to the stock of a company to be formed. The undertaking was in this form :

" The undersigned hereby respecti-
" vely agree to take the number of sha-
" res of one hundred dollars each in the
" capital stock of a company to be
" formed, under the name of the Ma-
" gog Textile & Print Company, herein
" below set after our names respectively,
" and to pay the amount of all calls
" thereon, at the office of the company
" in Montreal, at such times as the

" Provisional Directors or the Directors " of the company when incorporated " may direct."

In the subsequent proceedings, the promoters of this company, excluded Respondent, were themselves constituted the company " with all others who may become share holders " ; and they made different arrangements of an important kind affecting the capital of the company without the privity or consent of Respondent. *Held*, that the Respondent was not obliged to take the stock at the suit of the company, subsequently formed, under the above undertaking. *The Magog Textile and Print Company & Dobell.* Q. Judgment confirming, 7 October, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 9 Leg. News 348.

Les directeurs d'une compagnie incorporée n'ont pas, encore que l'acte d'incorporation permette d'augmenter le capital autorisé, le pouvoir de décréter telle augmentation du capital primitif, s'il est prouvé que, dans l'espèce, le pont de la compagnie est en bon ordre et n'a besoin d'aucune réparation, si une somme assez considérable d'argent est en caisse, toutes dettes payées, et si telle augmentation n'est faite que pour permettre aux directeurs la direction des affaires de la Compagnie. *Perreault et al. & Milot et al.* Q. Judgment confirming, 6 May, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 14 Rev. Leg. 417.

Powers of—As the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its views, it was not *ultra vires, Compagnie du Cap Gibraltar & Hughes.* Judgment confirming by the Supreme Court, 23 June, 1884. Sir W. J. Ritchie, C. J., Strong, Fournier, Henry, Gwynne, JJ. Strong, Gwynne, JJ., dissenting. Rep. 11 Sup. Court Rep. 537.

The Appellant signed an undertaking to take stock in a company to be incorporated by Letters Patent under Q. 31 Vict. c. 25, but was not a petitioner for the Letters Patent, nor was his name included in list of intending shareholders in the schedule sent to the Provincial Secretary with the petition. The Appelant's name was not mentioned in the Letters Patent incorporating the company, nor did he become a shareholder at any time after its incorporation.

Held. 1st. That the Appellant never became a shareholder of the company, and could not be held for calls on stock.

2nd. *The Union Navigation Co. & Couillard* (7 R. L. 215 & 21 J. 71.) *and Rascony & the same Co.* (1 Leg. News, 494 & 24 J. 133.) followed and approved. *McDougall et al. & the same Co.* (21 J. 63.) distinguished.

3rd. (Per Tessier, J.)—That a subscription to stock in a company to be incorporated is a mere proposition and not a binding promise to take and pay.

4th. (Per Ramsay, J,)—That under the terms of the Statute 31, Vict., Q. c. 25, the only persons who are shareholders in a company incorporated thereunder are those named in the Letters-Patent as such, and those who become members after incorporation. *Arless & Belmont Manufacturing Co.* M. Judgment reversing, 21 May, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Cross, J., dissenting. Rep. M. L. R. 1 Q. B. 340. 4 Dec. d'A. 233.

JUDGE.—ASSISTANT.—A case, in which two of the regular judges in appeal were disqualified, one as being a party to the suit, and the other owing to relationship within the prohibited degree, was heard before four judges, that is before two of the regular judges of the Court and two judges *a l hoc.* There was a difference of opinion, and the Court stood equally divided and a rehearing was ordered. In the meantime one of the disqualified judges resigned and the permanent judge was appointed in his place. The other disqualified judge obtained leave of absence and his place was filled by an assistant judge. The question then arose as to the judges by whom the re-hearing was to take place, and first whether the judges

ad hoc who had been seized of the case should sit. It was unanimously held that the two judges *ad hoc* who had been seized of the case should sit. *The Mayor &c. of Montreal & Drummond.* M. Judgment 17 March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. And the Court having reassembled to try the case Taschereau, Ramsay, Sanborn, Mackay, Torrance, JJ., it was suggested by Ramsay, J., that when a fifth judge was required to fill a vacancy, this complication not having been contemplated, the fifth judge had to be selected from the Superior Court. But the majority of the Court *held* that Ramsay, J., sat to complete the Court in virtue of his commi-sion as a regular judge of the Court. Ramsay & Mackay, JJ., dis. Rep. 18 J. 76. 5 Rev. Leg. 298.

JUDGMENT.—*v.* ALIMENTS. INTERLOCUTORY.

Security for costs in appeal.—A party obtaining leave to appeal from an interlocutory judgment, forfeits such right if the security by law required be not given within the delay fixed by the Court. *Buneau & McCaffrey*, Q. Judgment reversing, 8 June 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Q. L. R. 364. 1 Dec. d'A. 313, 11 R. Leg. 253.

Non obstante veredicto.—Under the article 423 of the Code of Civil Procedure, as amended by the 35th Vict., ch. 4, and article 424 of same Code, all motions for new trial, for judgment *non obstante veredicto*, and in arrest of judgment must be made before three judges sitting in Review, and not in the Superior Court.

Insufficiency and illegality of evidence are not grounds for a motion in arrest of judgment. *Fletcher & The Mutual Fire Insurance Co. for Stanstead & Sherbrooke.* M. Judgment reversing, 25 Jan. 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby JJ. Rep. 1 Dec. d'A. 177.

Final.—A judgment dismissing an *inscription en faux* is not a final judgment in the case, and consequently leave to appeal from it to the Privy Council will not be granted by the Court of Queen's Bench. *Darling & Templeton.* M. Judgment, 15 Feb. 1875. Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 105.

Ultra petita.—A person employed to repair railway carriages by changing them from platform trucks into passenger cars, cannot, being unpaid for his work, revendicate the cars so transformed as his property.

And having alleged they were his property, and demanding to be paid the value of the cars he cannot recover the value of the work which is not alleged nor prayed for. *Senécal & Peters.* M. Judgment reversing, 22 Sep. 1874. Monk, Taschereau, Bamsay, Sanborn, Sicotte, JJ. Rep. 7 Rev. Leg. 308.

New Trial.—An appeal does not lie to the Privy Council from a judgment of the Queen's Bench ordering a new trial. *The South Eastern Railway Company & Lambkin.* M. Judgment, 15 June, 1877. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 22 J. 21.

The Privy Council granted special leave to Appeal, and reversed the judgment of the Queen's Bench.

Clerical error.—A mere clerical error in a judgment which does not alter the dispositive, but only affects the narrative, will be corrected on application, even after the judgment is entered up in the register. So where the judgment by error stated that leave to appeal was granted by the consent of the opposite party, it will be amended by striking out such words, and substituting words to negative such consent. *Goldring & Bank of Hochelaga.* M. Judgment, 12 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 2 Leg. News 410.

Error in.—Where by error the Defendants were condemned jointly instead of jointly and severally, the Court will not amend the judgment for it is a question of law whether the condemn-

ation should be joint or joint and several. The remedy is by Appeal. *The Exchange Bank & Lord et al.* M. Judgment refusing motion, 17 Dec., 1883. Sir A. A. Dorin, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Petition to revise. — Errors in the printed factum of an appeal will not justify a *requête civile. Hampson & Thomson.* M. Judgment 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 206.

JUDGMENT TO ACCOUNT.—*v.* PLEADING AND PRACTICE.

JUDICIAL ADVISER.—A judicial adviser is given to those who, without being absolutely insane or prodigal, are nevertheless of weak intellect or so inclined to prodigality as to give reason to fear they will dissipate their property or seriously impair their fortune. 349 C. C.

Judicial advisers are given by those who have power to interdict, on the demand of any person who has a right to demand interdiction, and with the same formalities. Such demand may also be made by the party himself. 350 C. C.

If the powers of the judicial adviser be not defined by the judgment the person to whom he is appointed is prohibited from pleading, transacting, borrowing, receiving moveable capital and giving a discharge therefor, as also from alienating or hypothecating his property without the assistance of such adviser. The prohibition can only be removed in the same manner that the appointment has been made. 351 C. C.

If the demand for interdiction be rejected, the Court may, if circumstances require it, appoint a judicial adviser to the Defendant. C. C. 331.

* * the appointment of an adviser takes effect from the day of the jugdment, notwithstanding the Appeal. * * * the acts done by any one to whom an adviser has been given, without the assistance of such adviser are null, if injurious to him, in the same manner as those of minors and of persons interdicted for prodigality, according to article 987. C. C. 334.

The appointment of a judicial adviser does not necessitate a *reprise d'instance* because it does not change the status of the party. *Rolland & Michaud.* M. Judgment 2 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Where a person had verbally expressed the intention to make a donation, and subsequently when afflicted with softening of the brain and being of feeble intelligence, with the assistance of a judicial counsel, made the donation, it will be held valid. *Brault & Brault.* M. Judgment confirming, 27 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Monk J. dis. Rep. 1 Leg. News 495.

JURISDICTION.—The Court of Queen's Bench has no revisory power, except by way of appeal, over the proceedings of the Superior Court, and it cannot, on an application for *habeas corpus*, examine into proceedings of the Superior Court in order to see whether a warrant committing a person to jail for *rebellion à la justice* in a civil suit, requires him to pay, in order to get his discharge, a sum greater than he was condemned to pay by a judgment of the Superior Court. *Ex parte Pollock*, Petitioner for Habeas Corpus. M. Judgment rejecting petition, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ. Sir A. A. Dorion, C. J. dissenting. Reported 5 Leg. News 293, 2 Dec. d'A. 60.

A writ of *Habeas Corpus* will not be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested appear to be irregular, if it is within the scope of the jurisdiction of the Court from which it issued. *Exp. Healey.* M. Judgment in Chambers, Feb. 1878. Monk J. Rep. 22 J. 138.

To permit of a defendant being sued

in a district other than that of his domicile, under article 37 C. P., the cause of action must have arisen in one district. If it arose in different districts, the ordinary rules of summons prevail. *Faucher & Brown.* M. Judgment confirming, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ. Reported 2 Dec. d'A. 168.

An objection to the local jurisdiction if not pleaded, will be held to have been waived. *Gray & Dubuc.* Q. Judgment confirming, 5 Sep. 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Rep. 2 Q. L. R. 234.

The cause of action for goods sold by sample at Ile Verte, District of Kamouraska subject to the ratification of the principal at Montreal, ratified by him there, and goods forwarded thence to defendant at Ile Verte, arose in the district of Kamouraska. *Gault et al. & Bertrand.* M. Judgment confirming, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby JJ. Reported 25 J. 340.

La Cour Supérieure a juridiction pour connaître d'une poursuite, pour le recouvrement d'une somme excédant $200, pour travaux faits pour une corporation municipale sur des chemins aux frais du propriétaire, et ce, nonobstant les articles 398, 401, 951 et 1042 C. M. *Ross & Corporation of Ste Clotilde.* Q. Judgment confirming 8 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11 R. Leg. 520.

Where damages are the ground of action, and the facts occurred in two districts, the Defendant can only be sued in the district of his own domicile, or where he is served personally. So where Defendant began a prosecution against Plaintiff by accusing him of theft before the police magistrate, at Montreal, and a warrant was issued and Plaintiff was arrested in the district of Iberville, service on the Defendant in the district of Bedford, where he resides, summoning him to answer an action of damages in the district of Montreal for the above criminal proceedings is insufficient. *Bolduc & Archambault.* M. Judgment reversing 24 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dissenting thought that the service was sufficient, that the cause of action was the complaint which was made in Montreal, and that the other proceedings were merely accessory and incidental. Rep. 2 Dec. d'A. 110.

A foreign corporation may be sued at at any place in Lower Canada *where it has* an office for the transaction of business. So where a foreign corporation had an office for the sale of sleeping car tickets, at Montreal, the company was rightly impleaded in an action for damages for unlawfully expelling the Plaintiff, holder of a sleeping car ticket issued by the company, from one of their sleeping cars, and thus compelling him to travel to Montreal without the accommodation to which he was entitled. *The New York Central Sleeping Car Co. & Donovan.* M. Judgment confirming, 27 May, 1882.

Prothonotary, interdiction.—A judgment of interdiction which has been pronounced by the Prothonotary, is subject to revision by the Court only, and not by a judge in chambers. *Clement & Francis.* M. Judgment reversing, 30 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 5 Leg. News 301. 1 Dec. d'A. 346.

In Chambers.—A tierce opposition addressed to the Court was presented to a judge in chambers, and was dismissed for the following reasons: "1o parce qu'elle est adressée à un juge en chambre; 2o parce que le juge en chambre n'a pas juridiction pour décharger un séquestre; 3o parce que le tiers-opposant invoque pour la révocation du sequestre des droits de propriété sur lesquels un juge en chambre ne peut se prononcer; 4o parce que le fait qu'un tiers prétend être le propriétaire de droits à des mines dont la possession est déjà en contestation entre la Demanderesse et la Défenderesse rend leur séquestration plus nécessaire qu'elle ne l'était auparavant." *Doran & The Canada Gold Mining Co.* Q. Judgment

confirming, 4 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

An action to resiliate a lease should be brought before the Superior Court or before the Circuit Court as the amount claimed by the action, for lease or for use and occupation or for damages is of the jurisdiction of the one or other of those Courts, and not according to the annual rent or value of the premises. *Voisard & Saunders.* M. Judgment reversing, 21 Dec., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Tessier, JJ., dis. Rep. 22 J. 43. 1 Leg. News 41.

The Circuit Court has jurisdiction in real actions where the subject in litigation does not appear to be of greater value than $200. *Dumas & Gagnon.* Judgment reversing, Q. 4 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ

Where by law it is determined that certain penalties shall be recovered before a Justice of the Peace residing in the Municipality, and in default of there being such Justice residing there then before a Justice of the Peace residing in a neighboring Municipality, any prosecution before or fine imposed by a Justice of the Peace in a neighboring Municipality will be null if there be a Justice residing in the Municipality competent to act.

And a Justice of the Peace residing in the Municipality is not incompetent to act by reason of his being a rate payer. *La Corporation de St. Lazare & Aubé et al.* Q. Judgment reversing, 7 Sep., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Le Magistrat du District a juridiction pour le recouvrement de taxes municipales quelqu'en soit le montant.

Sous les articles 939 et 951 du Code Municipal, une Corporation locale peut être poursuivie devant le Magistrat de District pour le recouvrement d'une dette de Comté due par la Corporation locale à la Corporation du Comté. *La Corporation de la Paroisse St. Guillaume & La Corporation du Comté de Drummond.* Q., 5 Dec., 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 7 Rev. Leg. 562.

Legislative—Judicial— L'Intimé a été condamné pour vente de boissons sans licence, par le magistrat de police du district d'Arthabaska, à payer à l'Appelant, inspecteur des licences, une amende de $75, ou à aller en prison. Sur un writ de prohibition, la conviction a été annulée par la Cour Supérieure, parce que, en vertu de la sous-section 15 s. 92, de l'Acte de l'Amérique Britannique du Nord, l'Intimé ne pouvait être condamné à une amende et à la prison à la fois, et que la section 222, 41 Vict., ch. 3 (Québec), sous laquelle l'action a été intentée, était *ultra vires.*

Jugé en appel, infirmant le jugement de la Cour Supérieure.

1o Que l'Intimé n'a pas été condamné cumulativement à une amende et à la prison, mais à payer une amende et, seulement à défaut du paiment de cette amende, à aller en prison, et qu'il n'y a en cela aucun excès de juridiction, soit de la part de la Législature, soit de la part du magistrat qui a condamné l'Intimé;

2o Que l'existence d'un règlement prohibitif, en vertu du Code Municipal, n'affecte pas le droit de la Législature de la Province de Québec d'imposer une amende plus forte que celle imposée par ce règlement. *Coté & Paradis.* Q. Judgment reversing, 3 June, 1881. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Baby JJ. Rep. 1 Dec. d'A. 374.

JURY.—Where, to obtain six jurors speaking the language of the defence (English) the list of jurors speaking that language was called, and several were ordered by the Crown to stand aside; and the six English speaking jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one

of those previously ordered to "stand aside" was again called, *held*, that the previous "stand aside" stood good until the panel was exhausted by all the names on both lists being called. *The Queen & J. R. Dougall, & J. D. Dougall.* Judgment 22 Sept., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn. Rep. 18 J. 242.

JURY TRIAL.—An agreement to go into partnership with another to construct a railway is commercial, and consequently an action of damages for the breach of such contract may be tried by jury. *McLea & McDonald.* M. Judgment reversing, 3 Feb., 1876, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The service, within four days after issue joined on amended pleadings, of a notice of motion praying *acte* of the mover to have a trial by jury, and the making of such motion subsequently, are a sufficient compliance with the requirements of Art. 350 of the Code of C. P.. *Brown & The Imperial Fire Ins. Co.* M. Judgment reversing, Dec.. 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 20 J. 179.

If the Plaintiff fails to appear when the cause is called for hearing he may be non-suited; but the non-suit may be set aside, and a *venire de novo* may be ordered, according to English practice, on payment of costs by Plaintiff. *Bain & White et al.* M. Judgment reversing 22 Nov., 1881. Sir A. A. Dorion, C. J.

Under the article 423 of the Code of Civil Procedure, as amended by the 35th Vict., ch. 4, and article 424 of same Code, all motions for new trial, for judgment *non obstante veredicto*, and in arrest of judgment must be made before three judges sitting in Review.

Insufficiency and illegality of evidence are not grounds for a motion in arrest of judgment. *Fletcher & The Mutual Fire Insurance Co. of Stanstead, &c.* M. Judgment reversing 25 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 177.

The motion for judgment on the verdict, in a civil case, can only be opposed by means of a motion for a new trial, a motion in arrest of judgment, or a motion for judgment *non obstante veredicto* (422 C. C. P.); and where these motions had been made unsuccessfully by the Defendant, and the Plaintiff then moved for judgment on the verdict, the findings of the jury must be taken as they stand, and the Plaintiff's motion for judgment on the verdict will be granted if the findings of the jury are in his favor. *Fletcher & The Mutual Fire Ins. Co. for Stanstead & Sherbrooke.* M. Judgment reversing 24 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 6 Leg. News 340.

A Plaintiff having a right to a trial by jury, who has not made option by his declaration for such trial, may make his option after plea filed, and before completing the issue, notwithstanding the 64th rule of practice. *Masson & Gebhardt.* M. Judgment reversing June 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a jury by their verdict, in an action on a policy of Insurance covering goods in No. 319 St Paul Street, gave Plaintiff the value of goods stored in 315 St. Paul Street, being the neighboring warehouse, the verdict was set aside and a new trial ordered. *The Citizens Insurance Co. & Rolland.* M. Judgment reversing, 14 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Tessier, JJ. Rep. 1 Leg. News 604.

New trial—Where the jury by their verdict have found generally, that the death of a man killed at a place where the railroad crosses the high-road was by the negligence of the company, and where acts were suggested as being acts of negligence or omission, some of which were not guilty omissions, and some were such omissions as would render the railway company liable, the Court will not grant a new trial. *The Grand*

Trunk Railway Co. of Canada & Godbout. Q. Judgment confirming, 6 Sep. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ.

Where on a reserved case, the Court of Queen's Bench holds the conviction to be bad, and the question has been reserved whether a new trial should be granted, a new trial may be granted in cases of misdemeanors, under C. S. L. C. Cap. 77, S. 58, SS. 2,—the authority given to the Court of Queen's Bench ' to make such other order as justice requires," including the right to order a new trial where, in the opinion of the Court, the interests of justice require it. *Regina & Bain.* M. Judgment 22 June, 1877. Rep. 23 J. 327.

Where the damages granted by the verdict of a jury are excessive, the Court will set aside the verdict and grant a a new trial. *The North Eastern Counties Railway Co. & Lambkin.* M. Judgment reversing, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. On special application the Privy Council granted leave to appeal and this judgment was reversed.

A verdict of a jury awarding unjust and excessive damages, and such as are wholely unwarranted by the evidence, will be set aside and a new trial granted. *The Bank of Toronto & Ansell.* M. 1875. Rep. 7 Rev. Leg. 262.

JUSTICE OF THE PEACE, who is only resident in a neighbouring municipality, qualified to act in a municipality neighbouring to that of his residence, if there be no justice of the peace qualified to act resident of the municipality where the penalty is incurred, will be stopped by prohibition. *La Corporation de St. Lazare & Aubé et al.* Q. Judgment reversing, 7 Sept. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

JUSTIFICATION & SLANDER.

LANDLORD.—*v.* LESSOR.

Right to make repairs. — A tenant became insolvent, and the leased premises, which were vacant, subsequently becoming uninhabitable, the landlord proceeded to execute certain repairs.

Held:—That in default of a demand by the lessee, or his representative the assignee, to rescind the lease, it continued to subsist, and the lessor was entitled to rent, less the time occupied in making the repairs. *Rolland et al, & Tiffin et al.* M. Judgment reversing 22 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 164.

LAW.—An *ex post facto* law passed by a local legislature as to a matter within its powers is not unconstitutional. *Molson & the Mayor &c. of Montreal.* M. Judgment confirming 27 Jan., 1876. Rep. 23 J. 169. 8 Rev. Leg. 650.

LAW OF ENGLAND AS TO PROMISSORY NOTES.—*v.* EVIDENCE.

LAY DAYS.—*v.* CHARTER PARTY.

LEASE. — *v.* INSOLVENCY. — JURISDICTION.

Resiliation.—A lease will be rescinded if the premises are not habitable. *Leville & O'Brien.* M. Judgment reversing Dec., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Action under lessor and lessees act to rescind lease.—Motion to reject Appeal the annual rent being $50. However there was a clause in the lease (which was for seven years) permiting Defendant to purchase the property any time during the lease for $1000. The judgment set aside the lease, and thus determined Defendant's right to purchase. The motion to reject the Appeal was rejected, the Court holding that a title to land was in question. *Cauchon & Anderson.* Q. Judgment 1 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where the fire only partially destroys the premises leased, the lessee cannot oblige the landlord to terminate the lease. *Geriken & Pinsonneault.* M. Judgment confirming June 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Dorion, C. J., Sanborn, J., dis. were of opinion that the injury rendered the house uninhabitable.

It is not every failure on the part of the lessor to perform his obligations that will warrant the lessee in seeking to set the lease aside. So where the lessor of a farm promised to build a new house by the first week in May, and fallen to do so, and the lessee was living in the lessor's house, and did not complain of the delay, till the first term of the rent was due, an action to resiliate the lease was dismissed. *Ballantine & Snowdon.* M. Judgment confirming June 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

LEASE TO JOINT TENANT.—A lease to two persons of certain premises creates a joint and several liability to pay the rent, and the lessor cannot refuse the whole of his rent from one of them, the other having become insolvent. *Cohen et al, & Molson.* M. Judgment reversing Jan., 1876. Dorion, C. J., Monk, Ramsay. Sanborn, Tessier, JJ. Dorion, C. J., Sanborn, J., dis.

Verbal notice to quit. — A lessee is not liable to be put out of possession of the premises leased by a petitory action.

A lessee not holding for a fixed

period cannot be expelled without a notice of three months. Arts. 1642, 1642 (1) C. C. *Boudreau & Dorais.* Q. Judgment confirming, 4 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 458.

Tacite reconduction is the continuance of the lease on the same terms as it was formerly held without any new contract. *Hodgson & Evans.* M. Judgment confirming 15 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 300.

Emphyteutic. — Under an emphyteutic lease, the lessor has not for the payment of the rent and other obligations of the lease, the privilege which he has in an ordinary lease on the moveable property found in, or removed from the premises leased. *Alliot & The Eastern Townships Bank.* M. Judgment reversing. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 172.

A lease for 12 years, containing also a promise of sale, cannot be regarded as a lease giving rise to the summary proceedings provided for by Art. 887 *et seq.* of the Code of Civil Procedure. *Lépine & The Permanent Building Co. of Jacques-Cartier.* M. 27 January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 22 J. 300.

Tacite reconduction.—A question of evidence. *Dubois & Cassidy.* M. Judgment confirming, 24 November, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. dissenting.

Resiliation of—A tenant cannot question his lessor's title. *Poitras & Berger.* M. Judgment reversing, 20 Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J. dis. Rep. 2 Leg. News 390, 10 Rev. Leg. 214. Article 1625 C. C., does not apply to an emphyteutic lease. *Ib.*

Where a lessor has not stipulated that the lessee shall not sub-let. the lease will not be set aside although the lessee do sub-let. And where in a previous lease there was a prohibition to sub-let. not repeated in the subsequent lease, in which several other conditions of the former lease are renewed, the presumption is that it was not the intention of the parties to prevent subletting. *Rhéaume et al. & Panneton, et al.* Q. Judgment, 7 Jnne, 1879. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ. Monk, J. dis.

Of mining lands.—A memorandum in the following form: "The said William Hepburn hereby promises and binds himself to lease unto the said Thomas McCaw, his heirs and assigns for the term of ninety-years, all the mining privileges which may be found on the farm which he now occupies, being the East half of lot number 7 in the ninth range of Ascot. In consideration of which the said Thomas McCaw binds himself to give and pay to the said William Hepburn the one-tenth part of all the net proceeds of all minerals found on said farm, as well as £15 per acre for all the available land which he may destroy by his mining operations, in consideration of which he now acknowledges to have received one dollar, is not such a title as will allow the heirs of McCaw to oppose the sale of the minerals, the land being seized on a judgment against the owner. *Anderson & Tait et al.* M. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sicotte, JJ.

A *bail à rente à longues années* of a mill and its dependency within the li-

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(1) When the term of a lease is uncertain or the lease is verbal or presumed, neither of the parties can terminate it without giving notice to the other with a delay of three months if the rent be payable at terms of three or more months; if the rent be payable at terms of less than three months, the delay is to be regulated according to article 1642.

The lease or hire of a house or part of a house, when no time is specified for its duration, is held to be annual terminating on the first day of each year when the rent is at so much a year, for a month when it is at so much a month, for a day when it is at so much a day. If the rate of the rent for a certain time is not shown, the duration of the lease is regulated by the usage of the place. 1642 C.C.

mits of a seignory does not constitute a *vente seigneuriale*, which, for its preservation requires to be placed in the *cadastre*, under the acts for the abolition of the seigniorial tenure. *Hart & Co. & Trudel.* Q. Judgment reversing, 5 December, 1874. Monk, Taschereau, Ramsay, Sanborn, Bossé, JJ.

A lease will be amended where it appears that the lessor has failed to supply the lessee with a privy to which the latter was entitled under his lease. And the lessee having abandoned the premises as being uninhabitable for want thereof will not be held responsible for the rent after such abandonment. *Beaudry & Lupien.* M. Judgment confirming, 23 Sep., 1881.

LEGACY.—The sale of the object bequeathed under pressure of urgent necessity did not, prior to the Code, imply an intention to revoke the legacy.

Evidence of long cohabitation of a white man and an Indian woman in the North West Territory, the woman never having received the title of wife, will not establish a valid marriage. *Connolly & Woolrich* (11 p. 197) distinguished. *Fraser & Jones.* Q. Judgment reversing, 8 May, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J., dis. Rep. 8 Leg. News 178.

LEGATEE.—*v.* EXECUTOR.—*Liability of Particular.*—The particular legatees of an immoveable hypothecated by the testator are bound to pay the hypothec, to the exoneration of the testator's general estate, unless by the will it is otherwise ordered.

The ordinary provision in a will, that all the testator's just debts, funeral and testamentary expenses be paid by his executors as soon as possible after his death, is not such an order or direction as would exempt the particular legatees from paying such hypothec to the exoneration of the testator's general estate. *Harrington et al. & Corse.* M. Judgment reversing, 24 March, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ., Tessier, Cross, JJ. dis. Rep. 26 J. 79. 5 Leg. News 148.

This judgment was reversed in the Supreme Court, (Sir W. T. Ritchie, C. J., Strong, Fournier, Henry, Taschereau, Gwynne, JJ., 9 S. C. R. 412), on the ground that the ordinary clause of a will "that all my just debts, funeral and testamentary expenses be paid by my executors as soon as possible after my death" was a "direction by the testator to pay all his debts including the debt of $3,000 secured by the hypothec," taking the case out of the rule, it must be supposed, of art. 889 C. C. (Strong, J, dis.), Fournier, Taschereau, Gwynne, JJ. *Held* that "when a testator does not expressly direct a particular legatee to discharge a hypothec on an immovable devised to him, art. 899 C. C., (1), does not bear the interpretation that such legatee is liable for the payment of such hypothecary debt without recourse against the new or universal legatee."

Residuary.—Query, can a residuary legatee be a witness in an action by the testamentary executor, the result of which would be injurious or beneficial to such legatee. The question was raised but not decided. *M. Cruice et al. & Dannody.* M. Judgment confirming, Dec., 1875. Dorion, C. J., Monk, Ramsay, Sanborn.

LEGISLATIVE POWERS UNDER BRITISH NORTH AMERICA ACT 1867.—Public health is subject to the legislative powers of the local legislatures and the repeal of chapter 38 C. S. C. was beyond the powers of Parliament. *Rinfret & Pope.* Q. Judgment confirming,

(1) If before or since the will the immoveable bequeathed have been hypothecated for a debt of the testator remaining still due, or even for the debt of a third person, whether it was known or not to the testator the heir or the universal legatee, or the legatee by general title, is not bound to discharge the hypothec unless he is obliged to do so by the will. A usufruct established on the thing bequeathed is also borne without recourse by the particular legatee. The same rule applies to servitudes. If, however, the hypothecary debt of a third person of which the testator was ignorant affect at the same time the particular legacy and the property remaining in the succession, the benefit of division may be reciprocally claimed.

8 October, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ., Ramsay, Cross, JJ. dis.

By the act 45 Vict. (Q.) ch. 22, "to provide for the exigencies of the "public service" of the Province of Quebec, a tax was imposed on every bank, insurance company, and other commercial corporation doing business in the Province. The tax was imposed in proportion to the paid up capital of the banks, together with a tax on each office, etc. Some of the corporations interested in the cases here determined have their principal offices out of the Province, and some were incorporated in England or in the United States. In some cases, the stock is held chiefly by persons not resident in the Province of Quebec.

The taxes imposed on corporations by the act in question are personal and direct taxes within the Province, and such as are authorized by sect. 92, sub-sect. 2 of the B. N. A. Act, 1867. A corporation doing business in the Province is subject to taxation under sect. 92, sub-sect. 2, though all the shareholders are domiciled out of the Province.

Even assuming that the taxes in question should be considered as not falling within the denomination of direct taxes, the local legislature had power to impose the same, in as much as they were matters of a merely local or private nature in the Province, within the meaning of the B. N. A. Act, sect. 92, sub-sect. 16. *The North British and Mercantile Fire and Life Insurance Co. & Lambe.* M. Judgment confirming, 23 January, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Sir A. A. Dorion, C. J., Cross, J. dis., were of opinion that the taxes in question are indirect taxes and are not authorized by sub-sect. 16 of sect. 92 of the B. N. A. Act, 1867. Rep. M. L. R. I Q. B. 122. 1 Dec. d'A. 112.

NOTA.—Eight other appeals in which the same questions were involved, were argued in the same time, the judgment applied to all nine cases. *Lambe & Canadian Bank of Commerce; Lambe & Bank of Toronto; Lambe & Ontario Bank; Lambe & Merchants' Bank; Lamb & Molson Bank; The Williams Manufacturing Co. & Lambe; The Ogdensburg Towing Co. & Lambe; The Export Lumber Co. & Lambe.* The five appeals by the License Inspector, reversed, and the four appeals by corporations, confirmed. (1)

Toute législation sur la santé publique, dans chaque province, à l'exception des établissements des quarantaines et des hôpitaux de marine, tombe dans les attributions législatives de chaque province.

Le Parlement de la Puissance n'avait aucun pouvoir de rappeler les dispositions du ch. 38 des Statuts R. B. C., et que ces dispositions ne sont pas abrogées par le Statut du Canada, de 1868, 31 V., ch. 63, s. 15, et qu'elles étaient encore en force, le 4 Septembre 1885, date de la proclamation du lieutenant-gouverneur de la province, déclarant cet acte en force, et nommant un bureau central de santé.

La nomination d'un bureau local de santé pour la Cité de Québec, faite, le 16 Octobre 1885, par le lieutenant-gouverneur en conseil, vu le défaut du maire de la Cité de Québec de convoquer une assemblée du Conseil-de-ville, pour la nomination d'un bureau local de santé, après en avoir été dûment requis, dans les délais voulus par le statut, est légale, et pourra être déclaré telle à la poursuite d'un chef de famille résidant dans la municipalité, dans une procédure par *quo warranto.*

Après la nomination d'un bureau local de santé, par le lieutenant-gouverneur, à défaut par le maire d'avoir convoqué une assemblée du conseil pour en nommer un, le Conseil-de-ville de la Cité de Québec n'avait pas le droit de nommer un autre bureau local de santé. *Rinfret & Pope.* Q. Judgment reforming 8 October, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 605.

(1) Since confirmed in Privy Council.

While the local legislatures have no jurisdiction to deal with an indictable misdemeanour, that being a matter of criminal law assigned exclusively to the Parliament of Canada, they have authority to legislate for the prohibition of things hurtful to public health, not matter for indictment at common law, such as factory chimneys "sending forth smoke in such quantity as to be a nuisance." The local legislatures possess this power as coming under "municipal institutions" under B. N. A. Act, S. 92, No. 8; and the fact that a term of the criminal laws ("nuisance") is used in a local act to characterize an offense within the jurisdiction of the local legislature does not make the enactment *ultra vires* when the offence is not *per se* an indictable offense under the criminal law. *Pillow et al. & Mousseau, Att.-Gen.* M. Judgment confirming, 27 January, 1885. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 401. 14 Rev. Leg. 252.

Held:—That a powder manufactory where a quantity of powder exceeding 25 lbs, is kept, is a powder magazine within the meaning of 41 Vict. (Q.) C. 3 S. 170.

(By the majority of the Court):—That the Act above cited, which imposes a penalty for failing to take out a license, is not *ultra vires*, being in the nature of a police regulation, and as such within the powers of the local legislature, even supposing the provision of the Act requiring a fee of $50 to be paid for a licence were *ultra vires* as a revenue tax.

(By Ramsay, J.)—That the Act is valid, not as a police regulation, but as a licence Act, the local legislatures having power, under the B. N. A. Act, sect. 92, s. s. 9, to pass an Act for raising revenue by a licence fee. *The Hamilton Powder Co. & Lamb.* M. Judgment confirming, 23 November, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J. dissenting as to reasons. Rep. M. L. R. I. Q. B. 460. 14 Rev. Leg. 254.

The Legislature of the heretofore Province of Canada had power to authorize the Corporation of Quebec to make by-laws prohibiting under a penalty any interference with the ice-bridge across the River St. Lawrence. or with the ice stopping and forming a bridge, even by a steamer navigating the river.

The Recorder of Quebec has jurisdiction to try complaints of violation of the by-law made under the authority above mentioned. *Barras & The Corporation of the City of Quebec.* Q. Judgment confirming, 7 February, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dissenting. Rep. 11 Q. L. R. 42. 8 Leg. News 131.

LESION.—Persons of the age of majority are not entitled to relief from contracts for cause of lesion only (C. C. 1012.)

In this case no fraud was proved. *Charlebois & Charlebois.* Judgment reversing, 28 November, 1882. Monk, Ramsay, Tessier, Cross, Baby JJ. Rep. 26 J. 364, 5 Leg. News 421.

LESSOR & LESSEE.—*Sous locataire.—Where liable for rent.*—If there be a prohibition in a lease as to subletting a sub-tenant cannot claim the benefit of Article 1621 (1) of the Civil Code of Lower Canada, but under Article 1619 (2) his effects will be liable for the whole rent due by the original tenant to the landlord. *Les Sœurs de l'Hôpital Général & Yuile & al.* M. Judgment reversing, 20 Sep., 1875. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn JJ. Rep. 20 J. 329.

A lease by which a mill is let for twelve years with a stipulation that the lessee shall make certain buildings on the premises and to pay an annual lease, is subject to the provisions of

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(1) The right includes also the effects of the render tenant in so far as he is indebted to the lessee.

(2) The lessor has for the payment of his rent and other obligations of the lease a privileged right upon the moveable effects which are found upon the property leased.

the lessor and lessee's act. *Marett & Robitaille & al.* M. Judgment reversing, 8 June, 1876. Dorion C. J., Monk, Ramsay, Sanborn, Tessier JJ. Rep. 9 Rev. Leg. 420.

Building Society lease.—A lease for 12 years, containing also a promise of sale, cannot be regarded as a lease giving rise to the summary proceedings provided for by Act 887 *et seq.* of the Code of Civil Procedure. *Lépine & La Société de Construction Jacques-Cartier.* M. Judgment reversing, 27 Jan., 1879. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ., 20 J. 300.

A suit instituted under the Lessors and Lessees' Act may be united with a cause proceeding between the parties under the ordinary jurisdiction of the Superior Court, in which the same question is involved.

Where an agent in making a contract has suppressed a material fact within his knowledge, his principal cannot profit by the fraud, although he was himself ignorant of the fact suppressed.

Where shares were sold, purporting to be the shares of an incorporated company, when in fact, no such corporation was in existence, the error into which the purchaser was led was sufficient to annul the contract. *Chrétien & Crowley.* M. Judgment confirming, 19 January, 1882. Sir A. A. Dorion C. J., Ramsay, Cross, Baby, JJ. Reported 5 Leg. News, 268. 2 Dec. d'A. 268.

Where a landlord injures his tenant by negligence, in making alterations and repairs, damages may be recovered. *Jolicœur & Moisan.* M. Judgment confirming, 3 February, 1876, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

If water-pipes of a bad and insufficient kind burst in a leased house, and damage the tenant's property in the house, the landlord will be liable in damages. *Mann & Munro.* M. Judgment confirming, Sep. 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

And another tenant in possession of the portion of the premises where the break actually took place will not be liable as garant of the landlord. *Mann & Nield.* Judgment confirming. *Ib.*

Negligence of lessee. Damages. *D'Anglais & Lochead.* M. Judgment confirming, 3 Feb., 1876. Monk, Ramsay, Sanborn, Tessier, Sicotte, JJ.

A tenant is not under the control of his landlord within the meaning of C. C. 1054, (1) so as to make the landlord responsible for the negligence of the tenant in the use of the premises leased.

A proprietor is not responsible for loss occasioned by sparks from the furnace and chimney of a tannery erected and leased by him, where there is no defect in the construction of the furnace. *Dufour & Roy.* Q. Judgment confirming, 6 February, 1885. Sir A. A. Dorion, C. J., Monk, Tessier, Cross, Baby, JJ. Rep. 11 Q. L. R. 192. 8 Leg. News 75. 14 Rev. Leg. 511.

A contract of lease of steam-power to the extent of six-horse power, was not violated by sub-letting a portion of the motive power, there being no more power used than was mentioned in the lease, and there being no prohibition against sub-letting. *Sharpe et al, vs. Cuthbert et al.* M. Judgment reversing, 26 May, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 479. 4 Dec. d'A. 211.

Un locataire qui loue une maison pour l'occuper et qui l'occupe partie comme magasin et partie comme résidence privée, n'en change pas la destination en contravention à l'article 1624 C. C. (2) en souslouant la partie qu'il

(1) He is responsible not only for the damage caused by his own fault but also for that caused by the fault of persons under his control and by things which he has under his care.

(2) The lessor has a right of action in the ordinary course of law or by summary proceeding as described in the Code of Civil Procedure :

1. To rescind the lease : First—When the

occupait comme résidence privée à un club de jeunes gens qui se réunissent dans cette maison le soir pour discuter, fumer et s'y amuser. *Black et al, vs. Dorval et al.* M. Judgment confirming, 23 November, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dissenting. Rep. 14 Rev. 127. 29 J. 327.

LETTERS PATENT.—Suits to annull letters patent under the great seal of the Province must be brought by the Attorney or Solicitor General for the province, or other party authorized. *Pacaud & Rickaby.* Q. Judgment confirming, 7 Sep. 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 1 Q. L. R. 245.

Letters Patent for beach lots in deep water in the St Maurice rivière granted by the government of the Province of Quebec are valid. *Normand & La Compagnie de Navigation.* Q. Judgment reversing, 8 March, 1879. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R. 215. 10 Rev. Leg. 513.

Misrepresentation.—A party sueing to obtain letters patent for crown lands, is obliged to communicate full information before the officers of the Department to enable them to judge of the validity of his claim, and any concealment or misrepresentation will be a ground for annulling such patent.

And error of the officers as to the claimant's title will be a ground for annulling the patent. *Loranger Atty. Gen'l & Morin.* Q. Judgment reversing 4 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 1. Dec. d'A. 88.

Letters Patent issued in error of facts will be set aside. *Regina & Normand et al.* Q. Judgment reversing, 8 Sep., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

LETTER OF GUARANTEE.—*v.* GUARANTEE.

LIABILITY OF PARTNER IN INSURANCE.—*v.* INSURANCE.

LIBEL.—In a civil action for damages for verbal slander, the truth cannot be pleaded as a defence, unless it be that the occasion justified the statement, and that there was no malice. The change in the criminal law does not incidently affect the civil recourse. *Fahey & Baxter.* M. Judgment confirming, 11 Dec. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Where the libel complained of is only the answer to personal and anonymous attacks no damages will be allowed. *Beers & Bowker.* M. Judgment confirming, June 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The use of the expressions *dol* and *fraud* in an action are not necessarily libellous. And an action to set aside a deed on the ground of *dol* and *fraud* is not libellous if the allegations be made with probable cause, without malice, although the party making the allegation fails in his suit also.

A complaint to the Council of the bar is not a libel even if the complaint be rejected, if it be made with probable cause and without malice. *Barthe & Boudreault.* Q. Judgment reversing. 7 June 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

By medical practitioner.—A medical practitioner is liable in damages for maliciously publishing, in an action against his patient for fees for his services, the nature of the malady for which such services were rendered. And malice will be presumed from the publication. *H. & T.* Q. Judgment reversing, 5 June 1879. Sir A. A. Dorion,

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lessee fails to furnish the premises leased, if a house, with sufficient furniture and moveable effects, and if a farm with sufficient stock to secure the rent as required by law unless other security be given: Secondly—When the lessee commits waste upon the premises leased; Thirdly—*When the lessee uses the premises leased for illegal purposes or contrary to the evident intent for which they are leased.*

C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R. 267, 9 Rev. Leg. 579, 2 Leg. News 202.

A Priest is liable for malicious and calumnious words used by him in preaching or otherwise addressing his parishoners in Church. He is not liable for words used in admonishing his parishoners against any notorious scandal, or attempt to alienate his parishoners from their religious belief, although the nature of the admonition incidentally implies, but does not expressly formulate, a rebuke against a particular person.

A Priest's advice to a parishoner to avoid going to a certain place where conversation injurious to his religion is indulged in, is privileged, and this although it may be injurious to the trade of the person using or permitting such language to be used, and although the priest be aware that the effect of advising his parishoners not to frequent such place will be detrimental to the trade of such person. *Messire Blanchard & Richer.* M. Judgment reversing, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Sanborn, J. dis.

LICENCE. — *Taverne. Mandamus.* — L'Intimé, dans chacune de ces deux causes qui sont en tout semblables, ayant, en mai 1880, requis l'Appelant Inspecteur des licences à Trois-Rivières. de lui octroyer une licence pour tenir une auberge dans la cité de Trois-Rivières, pour une année, en lui offrant chez lui, la somme de $1.00 pour le coût de la licence et deux cautions, au désir de la loi.

Jugé:—Que l'Appelant n'était pas tenu de délivrer de licence à l'Intimé, qui, pour y avoir droit, devait payer à la municipalité une somme de $70 en vertu de la sous-section D., sect. 63, ch. 3, 41 Vict. *Lassalle & Bergeron.* Q. Judgment confirming, 7 March, 1881. Rep. 1 Dec. d'A. 257.

LICITATION VOLONTAIRE. — Where by agreement a notary was to be indemnified by a commission on the price of lands sold, and where the lands were bought in by the vendors to prevent sacrifice, the notary is not entitled to his stipulated commission, but only to the fee allowed by the tariff, and such disbursement as he may have made. *Hart & Pinsonneault.* M. Judgment confirming, 28 April, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby. JJ.

LIEN FOR ADVANCES.—By an agreement entered into between the Appellant, Respondents and one Joseph Gordon, respondents undertook to advance to Gordon a sum of $7,000.00 or so much more as should be necessary to manufacture and put on the track of the Northern Railway, in the Province of Ontario, a certain quantity of timber destined for Quebec. Respondents were to have a first lien on this timber for their advances, commission, etc. They now claim from Appellant the amount furnished to Gordon for manufacturing and bringing the timber to Quebec.

Held:—That although according to said agreement respondents undertook to advance only the amount required to put the timber upon the track of the Northern Railway, they have a legal lien for their disbursements for bringing the timber to Quebec. *Bew & Shortreed & al.* Q. Judgment confirming, 7 May, 1883. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 188. Reversed in S. Ct.

A commission merchant who refuses to deliver up to the owner the goods entrusted to him to sell until his commission and disbursements have been paid, must prove that the owner is indebted to him. *Beauport & Sureau.* M. Judgment confirming, 24 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 163.

LIEN BY LANDLORD FOR RENT. — The articles enumerated in art. 1622 C. C. as exempted from the landlord's privilege, are only illustrative of the description of effects which are exempted.

A piano stored with a piano dealer by a third party is only transiently on the premises, and, therefore, is not subject to the landlord's privilege for rent. *Ireland & Henry et al.* M. Judgment reversing. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 20 J. 327.

Deals manufactured from saw-logs sent to a mill to be sawn are not subject to the landlord's privilege for rent, but come within the exceptions declared by Art 1622 (1) of the Civil Code. *Price et al, & Hall.* Q. Judgment reversing, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 2 Q. L. R. 88. 10 Rev. Leg. 120.

LIEN FOR SHARE OF GENERAL AVERAGE.—*v.* AVERAGE.

Rutherford Bros., in Newfoundland shipped to Lord & Co., in Montreal, a quantity of herrings in August, on the 23rd August, Rutherford Bros., notified Lord & Co., of the shipment and telling them to account for the sales to Ridley & Sons, a firm known to Lord & Co., and with whom they had business relations. This letter was accompanied by a bill of Lading acknowledging the shipment of the herrings by Ridley & Sons. The letter and B. of L. were placed on board the ship (Jane) to be delivered to Lord & Co., on arrival. But on the 30th August, Rutherford Bros., repeated their instructions to Lord & Co., and directing Lord & Co. to insure, which they did and agreed to credit Ridley & Sons by letter of 16 Sep. On the 27 Sep., Rutherford Bros. acknowledge receipt of letter of the 16th and drew on L. & Co. for £76.0.2 which draft was accepted and paid by L. & Co. This note explained what was the consideration of this draft. On the 23 Sep., L. & Co. advanced to Ridley & Sons, who were already considerably in debt to L. & Co., $12,000. On the 13 October, Rutherford Bros. telegraphed to L. & Co., cancelling their former instructions and getting L. & Co. to credit them with the proceeds of the herrings. On the 14th October, L. & Co. acknowledge receipt of the letter of the 27 September, and of the telegram of the 13th October, allude to the failure of Ridley & Sons and promise to pay the draft of £76.0.2 at maturity, and make no objection to the cancellation of the former instructions.

On the 4th November the "Jane" arrived at Montreal. In the meantime Rutherford Bros. failed, and one Stabb came to Montreal to look after the interests of the Rutherford's estate. Stabb says L. & Co. made no objections to his taking charge of the cargo of the "Jane." It does not appear that he did take charge, and in a conversation with Major, one of the firm of L. & Co. Stabb relates that Major said he was glad they were to have the commission out of it.

Held that L. & Co. had no lien on the herrings for the general balance of Ridley & Sons. M. Judgment reversing, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Monk, Ramsay, JJ., were of opinion that after the despatch of the bill of Lading and the letter of advice and their acceptance, Rutherford Brothers could not change the instruction to the damage of L. & Co.; that by the Bill of Lading the property was transferred to Ridley & Sons; that L. & Co., were never dispossessed of the cargo of the "Jane," and that the silence of L. & Co. in their letter of the 14th October, or in their conversations with Stabb do not constitute a consent to change the original agreement. The saying "silence gives consent" does not hold good "*quando scilicet agitur de damno et incommodo tacentis,*" unless by the silence the other party is induced to do something he would not otherwise have done, or was prevented doing something he might have done "*Quod autem tacens quod contra dicendo potuit impedire, si non contra dixit, præsumitur consensisse.*" Men. 2e 6, p. 99, 15.

(1) It includes also moveable effects belonging to third persons, and being on the premises by their consent express or implied, but not if such effects be only transiently or accidentally on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired, or to an auctioneer to be sold.

LIEUTENANT GOVERNOR.—A by-law passed under the authority of Cap. 25, C. S. L. C., by a municipality subscribing for shares in a railway company, and approved by the Lieutenant Governor in the form required by law, cannot be declared null in a suit against the municipality for the taxes due owing to such By-Law. *The Corporation of the Parish of St. Guillaume & The Corporation of the County of Drummond.* Q. Judgment confirming, 5 June, 1876. Dorion, C. J., Monk, Ramsay, Tessier, McCord, JJ. Rep. 7 Rev. Leg. 721.

LIFE INSURANCE.—*v.* INSURANCE.

LIMITATION OF PROMISSORY NOTE.—*v.* PRESCRIPTION.

LIMITED LIABILITY. — *v.* INCORPORATION.—Promoters of a joint stock company who neglect the essential forms of incorporation, are all personally responsible and may be sued with the company in their individual names. *The Hunterston Lumber Company & Ward.* Q. Judgment confirming, Sep. 1874. Monk, Taschereau, Ramsay, Sanborn, JJ.

LIMITS.—*v.* TIMBER LIMITS.

LITIGIOUS RIGHTS.—Article 1584 C. C. § 4, which states that "the provisions of C. C. (1) 1582 do not apply when the judgment of a court has been rendered affirming the right," refers to a judgment upon the particular demand in litigation, and not to a judgment affirming another right of a similar character. *Brady & Stewart et al.* M. Judgment confirming, 22 March, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, Ramsay, JJ. diss. Rep. 9 Leg. News 374.

A bailiff of the Superior Court cannot purchase litigious rights. The character of the rights may be established by parol evidence. *Coté & Haughey.* Q. Judgment confirming, 3 Dec., 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dis.

A transfer of litigious rights made on condition that the assignee shall bear the costs, and share in the amount to be recovered, is void as being against law and public policy; and the assignee cannot maintain an action on such a transfer. *Power & al. & Phelan.* M. Judgment reversing, 24 September, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Monk, J. dissenting. Rep. 4 Dec. d'A. 57.

What is a litigious right? *Brady & Stewart.* M. Judgment confirming, 22 March, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, Ramsay, JJ. dissenting were of opinion that the judgment should be reversed as there was no doubtful fact involved in the matters in question, that there was no litigation at the time of the suit, and that matter of law can never be said to be doubtful. Rep. 9 Leg. News 374.

LITISPENDENCE. — *v.* PLEADING and PRACTICE.

LOAN OF MONEY. — *v.* COMMERCIAL MATTER.

LOCATION TICKET.—*v. Duquette & Gagné*, 1874.

(1) When a litigious right is sold he against whom it is claimed is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it.

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MAINTENANCE.—*v.* ALIMENTS.

Where a testator charged his universal legatee "*de pourvoir en bon frère aux besoins nécessaires de son frère A. C., de son épouse et d'un enfant issu d'un précédent mariage*" it is a bequest of aliments, and not only a provision in case of want. That the husband and child mentioned in the will being dead, and the wife married again her right to aliments subsists. That the husband being a party to the action only to authorize his wife *d'ester en justice*, and not in his personal capacity as head of the community, into which arrears of the alimentary pension and all payments under it must fall, there is a non-joinder, which, although not pleaded, prevents the Court rendering judgment on the merits, and the case must be sent back to the Court below. *Comte & Meunier et vir.* M. Judgment 23 January, 1884. Sir A. A. Dorion C. J., Ramsay, Tessier, Cross, Baby, JJ.

The mother of an illegitimate child can sue the father for an alimentary pension for the child, the mother having been appointed tutrix to the child.

The tutorship existing, the father cannot defend the action by offering to put the child in an asylum.

The judgment will not be reversed in appeal because it awards aliments for five months previous to the institution of the action, the father not having supported the child during that time. *Poissant & Barrette.* M. Judgment confirming, 17 Dec. 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 3 Leg. News 12.

And the mother may bring the action in her own name although she be not named tutrix, and where arrears of an alimentary pension have been given and the party charged has not objected, the judgment will be reformed, but without costs. *Kingsborough & Pound.* Q. Judgment confirming, 5 March, 1878. Rep. 4 Q. L. R. 11. 1 Leg. News 115.

When it is proved that the children of a person having need of support are poor, and that they offer to lodge, feed and provide for their father, it is in the discretion of the court not to order a payment in money, but to order the children to provide for their father in their own house. The fact that the father has remained does not affect the case. *Bachand & Bachand.* M. Judgment reversing, 29 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 12 Rev. Leg. 38.

Where by will certain property was bequeathed by a father to his son to supply him with aliments, and the property was declared to be *insaisissable*, the revenues are protected from seizure for the debts of the son; and if the son hypothecated the property as his own, be might set up the condition of the will, to defeat the execution of the hypothecary creditor, by which the rents were seized in the hands of a tenant.

But the wife and children of the debtor have no interest to urge this claim, and their intervention will be dismissed. *Molson & Carter.* M. Judgment reversing, 24 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J., dis. *Holmes & Carter.* M. Judgment confirming, 24 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, Cross, JJ., dis. Rep. 6 Leg. News 372. 3 Dec. d'A. 279.

Where a judgment of the Court of Queen's Bench in Appeal has been

rendered, declaring that certain rents, which had been attached, were really "*aliments*" and "*insaisissables*" the party in whose favor such judgment has been rendered cannot obtain an order to execute the judgment provisionally, if permission to appeal from the judgment to the Privy Council has been granted. *Molson & Carter.* M. Judgment, 29 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Leg. News 292.

The Court of Appeals will not grant an order to execute a judgment for aliments, during the delay granted to the tutor to obtain authorisation to appeal, that requirement having been neglected. If the judgment for aliments is executed, the order would be unnecessary, if not the Court would not feel justified in making a special order under the circumstances. *Clement & Frances.* M. Judgment, 26 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 6 Leg. News 325.

By husband to wife who has obtained separation.—The amount of will be regulated on the fortune of the husband and of the condition of life of the parties; and where the amount awarded by the Court of first instance is excessive it will be reduced in Appeal. *Gareau & Vincent.* M. Judgment reforming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

V. ARREARS.

A judgment allowing arrears of a *pension alimentaire* will be reformed, but without costs, the point not being taken by the Defendant. *Kingsborough & Pound.* M. Judgment, 2 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 115.

But in an action for aliments for an illegitimate child, against the father, the Court of Appeals will not disturb a judgment allowing aliments for five months before suit brought. M. Judgment confirming, 17 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 12.

MAGISTRATE'S DISTRICT COURT.—Section 7, 37 Vic., ch. 8, does not give jurisdiction to the District Magistrate's Court to issue a saisie revendication for a value of over $50. The section is in these words: "The provisions of the "Code of Civil Procedure contained in "the third book thereof, shall apply in "like manner, to every Magistrates "Court and to the District Magistrates "holding the same, and the officers "thereof, *except in so far as such pro-* "*visions are inconsistent with the pro-* "*visions of this act*, or are such as can "only apply to the Superior Court, or "to the Appealable cases in the Circuit "Court, as if the words "*Circuit Court*" "or "Judge" meant and included res- "pectively the words "Magistrates "Court" or "District Magistrate." *Blinn & The Magistrates Court of County of Brome.* Judgment reversing, 19 March, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The Magistrates District Court has jurisdiction in matters of rent. *Bergevin & Rouleau et al.* M. Judgment confirming, 21 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 179.

MAGISTRATE.—A magistrate cannot be condemned in damages for false imprisonment, if he acted without malice, and with probable cause. *Marois & Bolduc.* Q. Judgment confirming, 4 March, 1875.

A magistrate has a right to appear to contest the issue of a writ of prohibition. *Pacaud & Hemming.* Q. Judgment confirming, 5 June, 1874.

MALICE.—Injurious communications which are malicious are not privileged; and the fact that they were made unnecessarily will go far to establish malice. *Waldron et vir, & White et vir.* M. Judgment confirming, 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Where the libel complained of is only the answer to personal and inju-

rious attacks, no damages will be allowed. *Beers & Bowkers.* Judgment confirming, M. June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The use of the expressions *dol and fraud* in an action are not necessarily libellous. And an action to set aside a deed on the ground of *dol and fraud* is not libellous, if the allegations be made with probable cause and without malice, although the party making the allegation fails in his suit also. A complaint to the council of the bar is not a libel even if the complaint be rejected, if it be made with probable cause and without malice. *Barthe & Boudrealt.* Judgment reversing Q. 7 June, 1878. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ.

A medical practioner is liable in damages for maliciously publishing, in an action against his patient for fees for his services, the nature of the malady for which such services were rendered. And malice will be presumed from the publication. *H. & T.*, Q. Judgment reversing, 5 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R. 267. 9. Rev. Leg. 579. 2 Leg. News 202.

In a civil action for damages for verbal slander, the truth cannot be pleaded as a defence, unless it be that the occasion justified the statement, and that there was no malice. The change in the criminal law does not incidentally affect the civil recourse. *Fahey & Baxter.* M. Judgment confirming, 11 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

In an action of damages for an accusation of perjury, it is not justification to say that the defendant swore in an affidavit in support of a *pétition en destitution de tutelle* that the *assemblée de parents* took place at the house of one Major, instead of at the office of the Prothonotary, where it really took place, and that the meeting was secret, and the nomination of the tutor fraudulent, unless it appears there was a wilful intention to mislead ; and such intention will not be presumed, if there have been sufficient circumstances surrounding the nomination of the tutor to justify suspicion of fraud, although fraud may not have been sufficiently established. *Major & al. & Lalonde.* M. Judgment confirming, 2 February, 1881. Sir A. A. Dorion, C.J., Monk, Ramsay, Cross, Baby, JJ.

An action of damages will lie for false imprisonment where it appears the proceedings are malicious and without probable cause. *Beaudoin & Boisseau.* Judgment confirming, June, 1875. Dorion, C. J., Monk. Taschereau, Ramsay, Sanborn, JJ.

There must be malice and want of probable cause to render a person liable for arresting another under legal process. *Beauchemin & Trudeau.* Judgment confirming, Sep. 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

A creditor who arrests his debtor on *capias*, and has probable cause for so doing, is not liable in damages although the debtor can justify his proceedings. *Lapierre & Gagnon*, Q. Judgment reversing 7 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

MANDAMUS.—A mandamus will not lie to compel a company to transfer shares of its stock to a subscriber who has not signed an acceptance of such shares. *Hart & The Montreal Manufacturing Co.* Judgment confirming. 14 Dec., 1878. Sir A. A. Dorion, C. J, Monk, Ramsay, Tessier, Cross, JJ.

Mandamus to School Commissioners requiring them to carry out a judgment of the Superintendant of Education, to the effect that they should build a school-house on a piece of ground on which the old school-house stood and which was in their possession. The School Commissioners answed "*qu'ils étaient dans l'impossibilité de se conformer à la dite sentence, parce qu'ils n'avaient pas de titres à cette propriétés, et qu'ils étaient exposés à être troublés par la fabrique.*" *Held*, that this answer was insufficient, and the School

Commissioner were ordered to execute the sentence of the Superintendant. *Delisee & Les Commissaires d'Ecole de St-Jean*, Q. Judgment reversing, 7 Dec. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 6 Q. L. R. 322, 1 Dec. d'A. 93.

Mandamus will not lie to compel the Corporation of the Curé & Marguilliers to admit the complainant to his place in church. *Robillard & Le Curé & Marguilliers de St-Clement.* M. Judgment confirming, 22 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. (Ramsay, J., diss.) Rep. 8 Rev. Leg. 63.

Mandamus will not lie to compel a commissioner, appointed to enquire under the 32 Vic., ch. 8 (Q), to furnish a detailed statement of the accusations affecting the relator, or to allow him counsel, or to allow him to cross-examine witnesses, or to allow him to produce witnesses. *Belleville & Doucet.* Q. Judgment confirming, 4 March, 1875. Rep. 1 Q. L. R., 250.

No appeal lies to the Privy Council from a judgment quashing this mandamus.

The registrar will not be condemned on mandamus to efface the inscription of an hypothec in his books without the party making the inscription or representative being made party to the proceeding. *Robert & Ryland.* M. Judgment confirming, 15 March, 1877.

MANDATE.—Mandate is a contract by which a person, called the mandator, commits a lawful business to the management of another, called the mandatary, who by his acceptance obliges himself to perform it. The acceptance may be implied from the acts of the mandatary, and in some cases from his silence. C. C. 1701.

A factor or commission merchant is an agent who is employed to buy or sell goods for another, either in his own name or in the name of his principal for which he receives a compensation commonly called a commission. C. C. 1736.

A factor whose principal resides in another country is personally liable to third persons with whom he contracts, whether the name of the principal be known or not. The principal is not liable on such contracts to the third parties, unless it is proved that the credit was given to both principal and factor, or to the principal alone. C. C. 1738.

A deed of sale of rights to real estate ostensibly for valid consideration, followed by a *contre lettre*, in which it was admitted that no consideration was paid, and arranging how the proceeds of the sale of the property if any were recovered should be distributed, amounts to a contract of agency, and it may be rescinded by the principal if the agent does not use due diligence, subject to the expenses he may have incurred. *Thurber & Holland.* Judgment confirming that of C. of Review, 22 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The right of an agent to sell real estate cannot be gathered from acts of agency of a different character. *Stewart & White.* Judgment reversing, 6 Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An agent who has only general powers of administration has not power to bind his principal by making a promissory note in the name of the principal. *St. Jean & The Metropolitan Bank.* Judgment reversing that of Superior Court, 18 September, 1874. Monk, Ramsay, Sanborn, Tessier, Bélanger, JJ.

Power of attorney to agent to sign notes for the business of principal. *Query*, has the Bank discounting such note to enquire whether really for interest of principal? *La Banque Nationale & Converse.* Judgment reversing that of Superior Court, 29 January, 1878.

Authorisation to another to have repairs made to Defendant's house. Question of evidence. *Lutle & Bell.* Judg-

ment reversing judgment in Review, 8 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, JJ., Cross, J. dis.

An architect acting as an agent for a person having alterations and repairs made on a building, has no implied authority to alter the contract. *Millen & Shaw.* M. Judgment confirming, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The cessionnaire may contest the authorisation of an agent to collect money. *Tousignant & Blais.* Judgment, 8 September, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Commission of travelling agent. *Ames & Fuller.* Judgment, June, 1879.

An agent cannot agree to take payment of his principal's money in the supply of goods to persons in the employment of the principal. So where an agent of an advertising Company agreed to take payment for advertisements in furnishings to persons in the employment of the Company, it was held, confirming the judgment of the Superior Court, that the Company could recover the amount from the party advertising, there being no acquiescence on the part of the Company in the arrangement. And it was not held to be evidence of such acquiescence that the Company had accepted *bons* of their work-people on account. *Ste-Marie et al. & The Railway & Newspaper Advertising Company.* Judgment, 18 Sept. 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

Power to sell.—One Henry Aylmer, junr., having been authorized by power of attorney to sell a mill and several lots of land belonging to the Respondent, sold the whole to Appellant in payment of his own debts. The present action was instituted by Respondent to have that sale set aside.

Held:—That although Henry Aylmer, junr., was authorized to sell Respondent's property, he could not do so to pay his own debts, and that the sale to the Appellant was properly set aside. *Maher & Aylmer.* M. Judgment confirming, 21 Dec. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 106.

A party employed as agent to sell property cannot accept in payment his own indebtedness, and a sale for the consideration of the release of his own liability will be set aside as fraudulent *Maher & Aylmer.* M. Judgment, 21 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 106.

An agent entrusted with a sum of money, and who pretends it was stolen from him, must show by conclusive evidence that he was dispossesed of his charge, and without fault on his part, or he will be condemned to pay the money to his principal. *Gravel & Martin et al.* Judgment confirming, June 1874. Taschereau, Ramsay, Sanborn, Loranger JJ. Confirmed in Privy Council.

But if the principal admits that the money was stolen, or condones the negligence, he cannot subsequently oppose in compensation to a claim by his clerk for wages the money so lost. *Thompson & Watson.* Judgment confirming, 15 June 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 203.

An agent who converts the money of his principal to his own use will be compelled to pay interest on it. *Joseph & Phillips et al.* Judgment confirming that of Sup. Court, March 1875. Rep. 19 J. 162.

A commercial traveller whose principal has neglected to meet a draft drawn on him for the travelling expenses of the former, according to agreement, may pledge the samples in his hands for necessary expenses. *Kennedy & Cornell.* Judgment, confirming that of the Sup. Court, 17 Dec. 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A principal who agrees to pay a commission to an agent for the sale of his

manufactured goods, stipulating at the same time that the agent shall cease to manufacture the same article as he had previously done, and who secretly undersells his agents, cannot complain that the agent has not used due diligence, and therefore that he can refuse to pay him his commission on the goods the agent did sell. *The Joseph Hall Manufacturing Co. & McDougall.* M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

The Appellant, projector of a joint stock banking company, engaged Respondent to obtain subscribers for which he was to receive ¼ per cent, and it was expressly stipulated that "*cette commission sera payable après le premier versement.*" Few subscribers paid the 1st call, and the scheme was abandoned. *Held*, that the commission was due after the first call. *Hubert & Barthe.* M. Judgment confirming, 20 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 227.

Where a commission merchant has done business for a principal to whom he has rendered regular accounts sales, charging certain commission which have never been questioned, it will be presumed that the principal has acquesced in those charges. *Stevenson et al. & Henshaw.* M. Judgment confirming, Septembre, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A principal is bound to know the transactions of his agent, and where on interrogations on *faits et articles* he alleges ignorance of his own business the interrogatory will be taken as confessed. *McGreevy & Paille.* Judgment confirming that of Sup. Ct., 4 June, 1880. Sir A. A. Dorion, C. J. Monk, Ramsay, Tessier, Cross, JJ.

A general agent authorized to purchase goods for his principal, binds his principal for the price, although the agent may have been in funds to pay for these. *Poulin & Williams.* Judgment confirming that of Sup. Ct., 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

A person acting publicly in Montreal as the general agent of an insurance company, whose chief place of business is elsewhere, will bind the company for such supplies as may have been furnished the agent in good faith for the purposes of the insurance business, although by the arrangement between the agent and the company, it was understood the agent was to take a commission on the business done by him to cover all expenses. *Morton et al. & The Niagara District Mutual Fire Ins. Co.* Judgment reversing that of Sup. Ct., 13 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The principal who profits by a purchase made for his account by his agent, or clerk, is liable to the vendor although at the time of the sale, the vendor was ignorant of the fact that the agent was not the principal, *Côté & Paquet.* Q. Judgment confirming, 7 September, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. *Read & Birks*, 2 L. C. J. 161. *Ducasse & Beauyil*, 13 L. C. R. 13.

An agent purchased cattle as for himself, the owner not knowing he was transacting with an agent. The ostensible purchaser could not pay, and the vendor learned he was the buyer for appellant, that he had no business of his own except that of a buyer for appellant, and that appellant got the cattle and only settled with the ostensible purchaser by an account, which appeared to be that which might pass between a principal and agent and which appellant did not produce. *Held*, that the seller of the cattle had no recourse against the appellant. Q. Judgment reversing, 6 Dec., 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Baby, JJ., dissenting thought the course of business, between the ostensible purchaser and appellant to which this transaction was not an exception, was that between a principal and agent, that McShane got the cattle directly and had not proved he paid for them.

A transfer made by an agent fraudulently to the knowledge of the transferee will be set aside. *Connolly & Connolly.* Judgment confirming that of S. C., 18 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

The term "Commission Agent" is not synonymous with "factor." The possession or control of the goods of the principal constitutes the agent a factor. *Crane et al. & Nolan.* Judgment reversing, 20 Feb., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Ramsay J., dis. Rep. 19 J. 309.

A commercial agent acting for persons in the United States to sell flour, and not having the flour in his possession or subject to his control, is not a Factor or a Commission Merchant; and consequently he is not personally liable in damages for the non-delivery of the flour sold in the name of their principal. *Crane et al. & Nolan.* Judgment reversing that of Sup. C. Dorion, C. J., Monk, Taschereau, Sanborn, JJ., Ramsay, J., diss. Reported 19. J. 309.

The agents of a foreign principal, residing abroad and who is not declared, will be held personally liable on a contract signed by them in their own name, though the contract showed their quality of Commission Agents, and it was not known to the other party that there were selling goods to a mill from foreign principals. *Evans & McLea,* M. Judgment reversing, 2 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4. Leg. News 76. 1 Dec. d'A. 201.

Commission agents whose principals reside abroad held personally liable on contract signed by them in their own name, though the contract showed their quality of Commission Agents, and it was known to the other party that they were selling goods to arrive from foreign principals. *Evans & McLea et al.* M. Judgment reversing, 2 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4. Leg. News 76, 1 Dec. d'A. 201.

Where a contract is made with a foreign house the agent through whom the business is carried on cannot sue in his own name, as a factor, although the goods may have been delivered by him. *Doutre & Dansereau.* M. Judgment reversing, 17 Dec., 1879. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rép. 3 Leg. News 19.

Where there is a written contract between a foreigner and a party in Canada, the agent of the foreigner to deliver the goods cannot sue for the price of them in his own name. *Doutre & Dansereau.* Judgment reversing that of Sup. C., 17 Dec., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Le facteur ou agent d'un principal résidant en pays étranger est seul responsable, personnellement, envers les tiers.

Les personnes employées par ce facteur ou agent, qui est leur mandant, ne sont pas responsables, personnellement, des transactions faites au nom de leur mandant. *Dixon & Etu.* M. Judgment reversing, 21 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 7 Leg. News 213.

A lot of iron shipped to the port of Montreal on bill of lading, endorsed in blank, by which the master promised to deliver the goods on payment of freight. One Henderson, agent of Bickford the consignee for the purpose of receiving the goods, received money to pay the freight. The master delivered the goods without exacting the freight and Henderson died insolvent.

Held, confirming the judgment of the Superior Court, that the master could not maintain action against Bickford for the freight, to whom he had not given credit, Sep., 1875. *Fletcher & Bickford.* Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Bates, a merchant in England dealt with one Lear in Montreal, having doubts of Lear's solvency when about to fill an order from Lear, Bates delivered the goods to one Arnold in England desiring him to use his dis-

cretion as to their delivery, the invoice being made in Lear's name. Arnold sold the goods as being Bates goods to Williamson and Lear became insolvent. Williamson did not pay for the goods and being sued for the price, he pleaded that the goods were not Bates goods but Lear's, that Arnold was the agent of Lear, and that delivery to Arnold was delivery to Lear. *Held*, confirming judgment of Superior Court, that Arnold was the agent of Bates, and that Williamson had no interest to raise the question.

The power of an agent to sell on commission may be revoked at any time, subject to the rights of the agent. *Dillon et al, & Borthwick.* Judgment confirming, that of Superior Court, 15 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where the power of an agent is revoked before delivery, a sale begun cannot be completed by the agent unless there has been an acceptance by the purchaser which binds him. *Lynn & Niven.* M. Judgment reversing, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

The power of the agent may be revoked at any time by the principal.

The agent who alleges a sale cannot prove it without a memorandum in writing. *Lynn & Cochrane et al.* Judgment reversing, those of the Superior Court and Court of Review, June, 1874, Taschereau, Ramsay, Sanborn, Loranger, JJ.

Revendication in hands of. — L'Appelant, agent de l'Intimé à Montréal, devait recevoir une commission de 10 pour cent sur toutes les marchandises que celui-ci lui expédierait de France. Une grande partie de ces marchandises fut vendue par l'Appelant qui ne fit aucune remise d'argent à l'Intimé, et celui-ci fit saisir-revendiquer toutes celles qui n'avaient pas encore été vendues.

Jugé:—Que sous les circonstances l'Intimé était bien fondé à réclamer les effets qu'il avait expédiés à son agent. *de Beaufort & Lureau.* M. Judgment confirming, 24 March, 1883. Rep. 3 Dec. d'A. 163.

The evidence of an agent after his *mandat* is at an end will not be considered as an admission by the Defendant, and so where limitation was pleaded, and the Plaintiff pretended that there was a recognition of the debt and a promise to pay it, the evidence of the agent of the former Defendant will not be admitted to prove such recognition, (1235 C. C.) *Pinsonneault et al, & Desjardins.* Judgment reversing that of Superior Court, 17 Dec., 1879.

And an agent who alleges a sale cannot prove it without a memorandum in writing. *Lynn & Cochrane et al.* Judgmens, June 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

In August 1870, Rutherford Bros., merchants in Newfoundland, shipped on board the "Jane," at Labrador, a cargo of herrings consigned to Respondents at Montreal. On the 23rd August, the shippers wrote to Respondents advising them of shipment on account of Ridley & Sons, directing Respondents to sell the herrings and place the proproceeds to credit of Ridley & Sons, to whom account sales were to be sent, and Ridley & Sons were to arrange with Rutherford Bros. for their payment. This letter was accompanied by a bill of lading acknowledging that the herrings were shipped by Ridley & Sons and that they were to be delivered at Montreal to Respondents. The letter, the bill of lading came into respondents' possession simultaneously with the arrival of the "Jane" at Montreal in the month of November.

On the 30th August, Rutherford Bros. again wrote to Respondents repeating the directions of the letter of the 23rd August, and requesting Respondents to insure. On the 16th September, Respondents acknowledged the letter of the 30th August, said they had insured and agreed to credit Ridley & Sons as directed.

On the 27th September, Rutherford Bros. wrote to Respondents acknowledging Respondents' letter of the 16th, and saying that they had drawn on Respondents for £76.0.2. It is not told why.

On the 23rd September, Respondents advanced Ridley & Sons $12,000. On the 13th October, Rutherford & Bros. telegraphed to Respondents cancelling their previous instructions, and desiring then to give them credit for the herrings.

On the 14th October, Respondents acknowledged the receipt of the letter of the 27th September and of the telegram and they agreed to pay the draft of £71.0.2 at maturity. They were silent as to the rest.

On the, 4th November, the "Jane" arrived at Montreal. By this time Rutherford Bros. had failed and Appellant as assignee came to look after the estate.

Appellant contends that he got possession of the cargo at Montreal by consent of Respondents, who took then back from Appellant, agreeing to sell it for the benefit of the estate so as to retain the commission. If this be proved must succeed; but on the other hand it is considered that there was no mention of Respondents' rights, and without the existence of a contract there was no evidence of Stabb having even had possession of the cargo of the "Jane." This gives rise to a question of law, namely whether Rutherford Bros. could change his instructions after they had been acted upon by Respondents.

The majority of the Court was of opinion that, under the circumstances, the estate of Rutherford Bros. was the owner of the herrings, which had come into possession of Respondents after the failure of Rutherford Bros. *Stabb & Lord et al.* M. Judgment reversing, March, 1875 Dorion, C. J., Monk, Taschereau, Ramsay, Sanborne, JJ., Monk, Ramsay, JJ. dissenting were of opinion that no new contract was proved between Respondents and Stabb at Montreal,—that there was nothing but an understanding that Respondents should sell and get their commission, in any event, leaving the question of ownership to be decided later,—that the shipment to Respondents was by Ridley & Sons, and that Rutherford Bros. could not change the destination of the cargo, *in transitu*, or the application of its proceeds to the detriment of the Respondents. "*Nemo potest mutare consiliam suum in alterius injuriam.*" They were also of opinion that the silence of Respondents in answering the telegram of the 13th October did not affect the question, as Respondents were then required, and his silence did not and could not damnify the shipper.

Persons doing business generally as brokers and commission merchants sold flour, to arrive from Chicago, for a principal resident there. The name of the principal was declared in the contract note, and the agent signed as "commission agents."

Held:—That the agents, not having the goods in their possession or under their control, could not be considered "factors under article 1738, C. C., but were merely brokers."

The term "commission agent is not synonymous with "factor".

The definitions of "broker" and "factor" in article 1736 C. C., are not to be interpreted literally as establishing a strict rule, but as general comprehensive definitions, subject to interpretation and extension according to the ordinary distinction applied to these two classes of agents.

The possession or control of the goods of the principal by the factor distinguishes him from a broker. This distinction is the real foundation of the exceptional liability which attaches to a factor when contracting for a foreign principal. The broker, like other mercantile agents, incurs no personal liability, if he does not exceed his instructions; the factor, on the contrary, acting for a foreign principal, is personally responsible as if he were principal.

Although the personal liability of the factor or *commissionnaire* is by law presumed when he acts for a foreign principal, yet he may always free himself from such liability by the contract itself, or destroy the legal presumption by the circumstances attending the transaction. *Crane et al. & Nolan.* M. Judgment reversing, 20 February, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Ramsay, J., dis. Reported 19 J. 309.

A person holding property as trustee under a deed of conveyance from an insolvent firm is by law entitled to *ester en justice* for the protection of the rights conveyed to him by such deed; and accordingly in the present case it was held that such trustee was entitled to plead in his own name to an action of revendication based on a pretended sale from the insolvents to the Plaintiff.

Though *déplacement* is no longer necessary to the validity of a sale, yet where there is no déplacement fraud and simulation are easily presumed; and where a pretended sale was a mere contrivance intended to obtain, under color of a sale, a security upon the effects, and thus avoid the delivery of possession which is essential to the validity of a pledge, it was held inoperative. *Moffat & Burland*, M. Judgment reversing, 27 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 4 Dec. d'A. 59. 7 Leg. News 182. Reversed in Supreme Court. 11 Sup. Court Rep. 46.

The plaintiffs were trustees under a deed of assignment from insolvents, with authority to carry on the business until it should be wound up, which was to be completed within two or three years. The business was not wound up in that time, but was carried on by the plaintiffs on an extensive scale with funds raised on their own credit, and large losses were incurred. *Held*, by the majority of the Court, in an action by the plaintiffs against creditors who had signed the trust deed, to oblige them to repay the amount of such losses, that the plaintiffs were not, under the circumstances, agents of the creditors, so as to make the latter liable for the result of their operations. *Chinic et al. & Garneau.* Q. Judgment confirming, 7 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Leg. News 210.

Le mandataire, qui reçoit de son mandant une somme d'argent à remettre à un tiers pour éteindre une obligation du mandant vis-à-vis de ce tiers, doit, si l'obligation à taux élevé, faire diligence pour exécuter son mandat, sans quoi il sera tenu au paiement de cet intérêt pour tout le temps qu'il aura négligé de faire remise des sommes d'argent dont il était porteur pour le tiers. *Dulac & Bolduc.* Q. Judgment confirming, 8 Oct., 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J., dis. Rep. 14. Rev. Leg. 359, 8 Leg. News 370.

(Following *Browne et al. vs. Pinsonnault*, 3 Supreme Court Reports 102.) An assignment by an insolvent debtor of his estate for the benefit of his creditors, does not confer upon the assignee the right to pursue or defend in his own name the actions accruing with regard to the estate and property assigned. *Reynar & Porteous et al.* Q. Judgment reversing, 8 Oct., 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ. Ramsay, J., dissenting as to reasons, was of opinion that the legal title was not in Porteous, differing in that from the case of *Burland & Moffat.* In the case of *Browne et al. & Pinsonneault* the question was not adjudicated upon by this court. (1)

Appellant & Respondent are banks, —the former a saving's bank, and the latter an ordinary banking institution. On the 13th Sep., 1873, C., Respondent's cashier obtained a loan in his own name from Appellant, on the security of shares of the Respondent bank, standing also in his own name. These shares

(1) The Supreme Court did adjudicate upon the two questions, which was not absolutely necessary. This according to a learned and polite *dictum* reproduced in Cassel's Digest, p. 38, is " extra judicial and unwarranted."

declining in value, C. substituted therefor notes the property of Respondent, intimating that the loan was made to Respondent, and not to himself personally. On the 23rd June, 1875, the transaction was entered in the books of Respondent as being a transaction of Respondent and not of C. personally and on the 29th July, 1875, the passbook between Appellant and Respondent was altered in accordance with the same pretension.

Held:—That a principal may, by subsequent ratification, or even by tacit acquiescence, render himself responsible to a third party for the act of his agent in excess of his authority, and that in this case the Respondent, being well aware of Appellant's pretension, and having acquiesced in it until 5th of August, 1876, and obtained other loans from the Appellant, must be held to have ratified the act of its agent C., and become bound thereby. *La Banque d'Epargnes de la Cité et du District de Montréal & La Banque Jacques Cartier.* M. Judgment reversing, 25 January, 1886. Sir A. A. Dorion, C. J, Ramsay, Cross, Baby, JJ. Rep. M. L. R. II Q. B. 64. 9 Leg. News 86.

Where an agent acting for the government discloses his agency, he is not personally liable until he has received funds to pay the amount due. It is not necessary, to make the agent liable, that he should have received a sum of money to pay the particular claim sued for; it is sufficient if he has received money to pay accounts of that kind. But, *held*, in the present case, that the evidence of his having funds was insufficient. *Quesnel & Béland.* Q. Judgment reversing, 5 February, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ., dissenting. Rep. 9 Leg. News 105. 12 Q. L. R. 129.

The agent of an insurance company has no authority to accept an insurance and give a receipt for his individual debt to the person insuring, and such act on his part will not bind the company. *The Citizens Insurance Co. & Bourguignon.*. M. Judgment reversing, 25 January, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R. II Q. B. 22. 9 Leg. News 85.

A. acting for B., his undiscovered principal, sold to C. a cargo of coal to arrive, C. to have the option of taking the coal at the weight given in the bill of lading or of having it re-weighed at seller's expense. C. accepted the coal without re-weighing, but afterwards weighed it in his own yard, without notice to the seller, and mixed it with other coal. *Held*, that B. the undiscovered principal, might sue on the contract in his own name. That C., by tendering in his second plea the price of the coal admitted to have been received, acknowledged that the action had been properly brought by B. *The Canada Shipping Co. & The Victor Hudon Cotton Co.* M. Judgment reversing, 24 March, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. The Chief Justice and Ramsay, J., dis. Rep. 5 Leg. News 302, 2 Dec. d'A. 356.

Where an agent in making a contract fraudulently suppressed a material fact within his knowledge, his principal cannot profit by the fraud, although he was himself ignorant of the fact suppressed, *alterius circumventio alii non præbet actionem, de vig. in-2*, 49.

And so where shares were sold, purporting to be shares of an incorporated company, when, in fact, no such corporation was in existence, the error into which the purchaser was led was sufficient to annul the contract. *Chretien & Crowley.* M. Judgment confirming, 19 January, 1882. Rep. 5 Leg. News 262, 1 Dec. d'A. 385.

Under the terms of the following letter the signer intended to make himself, and is personally liable:

Montreal, May 11th, 1877.

Messrs. Ritchie & Borlase,

Gentlemen,

We, the undersigned, acting as director and secretary of the Montreal Omnibus Company, hereby agree to see the account that Brown and St. Charles

have against the above Company duly settled, provided the said account shall be made out and agreed upon as either the Court or arbritators appointed shall decide.

(Signed) R. KERR,
As President of the Montreal Omnibus Company.

Although the above letter was evidently incomplete, having been intended to be signed by more than one individual, yet the signer waived the right he might have had to treat it as an incomplete document, by signing and delivering it to the Plaintiff's agents. *Kerr & Brown et al.* Judgment confirming, 14 Dec., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., dis. 23 J. 227.

The agent of an insurance company cannot bind the company by agreeing to hold a party insured for board and lodging he was to furnish the agent. But where the agent made a note for the insured which he gave him to understand would be liquidated by the agent's board, and gave it to the company who held it as cash, the company will be liable in case of a loss by fire. *The Ottawa Agricultural Company & Bouthillier alias Boutiqué.* Judgment confirming, 22 September, 1874. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Cross, J., dis. Rep. 2 Leg. News 394.

MANDATOR.—*v.* INTEREST.

MARGUILLIER EN CHARGE.—The action to compel the *Marguillier sortant de charge* to render an account, may be brought without the authorisation of the parishoners, *contribuables*, as being a suit necessary for the recovery of the ordinary revenues of the Fabrique. This case is therefore within the exception of art. 24 of the *arrêt of St. Jean en grève*, whereas the case of *Verchères & Verchères* is within the rule of the article.

In a case like this it is the duty of the new Marguillier to proceed to recover by suit, *après néanmoins en avoir communiqué au bureau ordinaire, à peine de demeurer en son propre et vrai nom, garant et responsable de tous les évènements.* On the merits it is no answer in the mouth of the old Marguillier to say that he cannot get access to the books, and therefore to ask the dismissal of the action. *Le Curé et Marguilliers de Beauharnois & Robillard.* M. Judgment reversing, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

Usage as to meetings to appoint marguilliers.—Il n'a pas été prouvé que, d'après l'usage dans la paroisse de St. Thomas de Montmagny, que les paroissiens ne pouvaient élire comme Marguillier que l'une des trois personnes proposées par le Marguillier sortant de charge, sans pouvoir eux-mêmes en proposer d'autres.

En supposant qu'un tel usage aurait été prouvé il ne pourrait prévaloir sur le droit que les paroissiens ont, en vertu de la loi, d élire l'un d'entr'eux pour être marguillier sans aucune restriction quant à leur choix. *Moreau Collin.* Q. Judgment reversing, 5 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 26.

MARRIAGE CONTRACTS.—A donation by contract of marriage of all the moveables belonging to the deceased at the time of his death becomes inoperative if the donor sells all his movables before his death. *Cahill & Hachette et al.* M. Judgment confirming. 15 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 7 Rev. Leg. 513.

The *emploie* of money stipulated *propre* of the wife by marriage contract, must be made incontinently at the acquisition of the property, and the declaration that the husband employs the money on property already purchased by him is only a *vente déguisée. Dionne & Ross*, Q. Judgment confirming, 3 March, 1881, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The separate property of the wife in the common habitation of the husband and wife is not property in possession of the husband. *The City of Montreal et al. & Greene et vir.* M. Judgment

confirming. 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay. Tessier, Cross, JJ.

A husband, Defendant in a suit to authorize his wife, is not in the record so as to be bound personally by the judgment as regards his separate and individual interest. *Comte & Lagacé et vir.* M. Judgment 23 January, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

La saisie de bien meubles, trouvés au domicile d'un débiteur, ne peut être annulée par une opposition de l'épouse, alléguant qu'elle est séparée de biens d'avec son mari, et que les effets saisis lui appartiennent, si la preuve établit que les meubles saisis, bien qu'achetés partie par son mari au nom de sa femme et partie par celle-ci, ont tous éte payés des deniers du mari.

L'abandon fait à telle opposante par trois des créanciers du débiteur saisi, de meubles appartenant à celui-ci, ne peut faire cette opposante propriétaire des dits meubles. *Tardif & Campbell et al.* Q. Judgment confirming, 6 May, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 434.

A wife *commune en biens* with her husband, may, during his lifetime, validly renounce to a right of usufruct reserved to her in the event of her surviving her husband, on property possessed by him subject to a substitution in favor of their children. The fact that on her husband's death she renounced to the community will not affect the validity of the renunciation of her usufruct, which does not come within the prohibition of C. C. 1301.

The jurisprudence on the subject of art. 1301 (1) reviewed. *Langlois & Langlois.* Q. Judgment reversing, 4 February, 1886. Monk, Ramsay, Cross, Baby, JJ. Rep. 9 Leg. News 90.

(1) A wife cannot bind herself either with or for her husband otherwise than as being common as to property ; any such obligation contracted by her in any other quality is void and of no effect. 1301 C. C.

So where a widow claimed her dower on real estate mentioned in her marriage contract, and charged with dower which had been exchanged for other real estate, with her consent, her action against the *détenteur* will be dismissed. *Girouard & Trudel.* M. Judgment confirming, 25 January, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 4 Dec. d'A. 39.

When the surviving husband has not made an inventory within three months of the decease of his wife, there is continuation of community between him and his children.

Such continuation of community may be stopped by an inventory made in due form and closed in presence of a *légitime contradicteur. Côté & Côté.* Q. Judgment reversing, 8 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Monk, J. dis., probably owing to certain irregularities in making the inventory in the particular case, and not on the general principles enunciated here.

A tripartite community of property is dissolved by the death of the second wife if she dies without leaving any minor children, and the third share of the second wife in an immoveable, purchased during the existence of such tripartite community, is a *propre* of the issue of such second marriage.

That the surviving husband has no right to alienate the third share of such immoveable after the death of the second wife, and the purchaser of the rights of the issue of the marriage, of age at the time of the mother's death, has a right to bring his action of *partage* of said immoveable. *Francœur & Mathieu.* M. Judgment reversing, 22 December, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 288, 8 Rev. Leg. 665.

As the *conquets* of the previous *communauté* do not fall into the second *communauté* with the second husband, it follows that such property is not conveyed by a bequest in these words : " *tous les meubles et immeubles dépen-*

dant de leur communauté et acquis par eux conjointement, de quelque qualité qu'ils soient, en quelque lieu qu'ils se trouvent et situés pour par lui en faire et disposer, etc." Pilon & Brunet et al. M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The husband has no power to hypothecate an immoveable *conquet* of the community, after the dissolution of the community, and a hypothec given by him at that time can only affect his half of the property.

The heirs at-law of the deceased wife are seized by operation of law of her share in such immoveable. (Art. 607 C. C.) *Dallaire & Gravel.* M. Judgment reversing. 21 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 286, 2 Leg. News 15.

A husband may execute a valid hypothec in favor of his wife on his immoveable property, in lieu of a hypothec which she had by her contract of marriage, to secure a sum of money brought by her at the marriage and reserved as propre by her contract of marriage. *La Société de construction Montarville & Cousineau et vir.* M. Judgment confirming, 3 Feb., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 329.

A right given to an intended wife by a contract of marriage, in case she *survive* her intended husband, to the legal interest of one-third of the property and assets belonging to his "*succession* and estates," cannot be exercised during the lifetime of the husband, against the property and estates assigned by him under the Insolvent Act of 1875. *Workman & Renny et al.* M. Judgment confirming, 5 Feb., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 324, 2 Leg. News 82.

Hypothec of property of community after its dissolution.—The heirs-at-law of the deceased wife are seized, by operation of law, of her share in such immoveable, and a husband has no power to hypothecate a *conquet* of the community after its dissolution, except for his own half of the property.

MARRIED WOMEN.—*Authorisation of, to appeal.*—A married woman who appeals must be authorized, and an appeal brought without authorisation will be rejected. *St. Jean & The Metropolitan Bank.* M. Judgment rejecting appeal, September, 1874. Monk, Taschereau, Ramsay, Sanborn, JJ.

Where goods are sold to the husband and credit is given to him, his wife separated as to property will not be held liable. (The case of *Hudon et al. & Marceau*, referred to 23 J. 45.) *Paquette & Guertin et al.* M. Judgment confirming. 14 June, 1879. Sir A. A Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 210.

A wife *séparée de biens* is not liable for the price of necessaries furnished to the husband, and on his credit.

Nor can she become liable by endorsing his promissory note given in payment of such effects. *Bruneau & Barnes et vir.* M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Monk, J. dis. Rep. 3 Leg. News 301, 25 J. 245.

Can a married woman bind herself with her husband and how? Can she renounce to her reprises? — These questions were raised in *Panet & Hamel* but not decided. Q. December, 1874. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

A married woman, authorized by her husband, can bring an action of damages in her own name for personal wrongs. *Dame Sarah Ann Waldon et vir, & Dame Maria White et vir.* Judgment confirming, 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

A married woman is liable on an obligation entered into by her with a party in good faith to borrow money, although the money be employed to pay her husbands debts. *Martel & Prince.* Q. Judgment, 6 March, 1877.

Monk, Ramsay, Sanborn, Tessier, JJ. Monk, J., dis. Rep. 8 Rev. Leg. 138.

La femme mariée sous le régime d'exclusion de communauté, peut emprunter, avec l'autorisation de son mari, et que l'obligation qu'elle contracte pour le capital et les intérêts n'est pas prohibée par l'article 1301 C. C. *Ross & La Société Permanente de Construction.* Q. Judgment confirming, 4 December, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 12 R. Leg. 130.

MARITIME LIEN.—An action brought to recover the price of cord wood furnished in eighteen hundred and seventy six, to the Ottawa and Rideau Forwarding Company, in Plaintiffs' declaration mentioned, at different times during the season of navigation of that year, and not for the last voyage of either of the vessels mentioned in the said declaration, will be dismissed, the privilege under art. 2383 s. 5, C. C., being only for supplies for last voyage and not for the season. *Owens et al, & The Union Bank of Lower Canada.* M. Judgment confirming, 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

MARRIAGE LICENSE.—*v.* PROCEDURE.

MASTER AND SERVANT.—The principal kinds of work which may be leased or hired are:

1. The personal services of workmen, servants and others;

2. The work of carriers, by land and by water who undertake the conveyance of persons and things;

3. That of builders and others who undertake work by estimate or contract. 1666 C. C.

The contract of lease or hire of personal service can only be for a limited term or for a determinate undertaking. It may be prolonged by tacit renewal. 1667 C. C.

It is terminated by the death of the party hired or his becoming without fault unable to perform the services agreed upon. It is also terminated by the death of the party hiring in some cases according to circumstances. 1668 C. C.

In an action for wages by domestics or farm servants in the absence of written proof the master may offer his oath as to the conditions of the engagement, and as to the fact of the payment, accompanied by a detailed statement. If the oath be not offered by the master it may be deferred to him, and is of a decisory nature as regards the subjects to which it is limited. 1669 C. C.

The rights and obligations arising from the lease or hire of personal service are subject to the rules common to contracts. They are also regulated in certain respects in the country parts by a special law and in the towns and villages by bye laws of the respective municipal councils. 1670 C. C.

Le maitre qui renvoie son engagé, sans raison suffisante, sera condamné à lui payer des dommages égaux au montant perdu par l'engagé pendant le temps pour lequel il n'a pas été employé, et aussi à la différence des gages par lui gagnés ailleurs. *Robinson & McMillan.* M. Judgment confirming, 24 April. 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk J., diss. Rep. 13 Rev. Leg. 565.

An employer is liable for any want of care on his part by which his servant is injured; and, therefore, if he engages an unskilled or careless person to conduct his work, and owing to the want of skill or care of the person so employed, another workman is injured, the employer is responsible. But in order to hold the employer responsible, it must be clearly established that the negligence or want of skill of the fellow workman caused the accident by which the damage was occasioned. So, where two workmen were engaged in an operation not shown to be hasardous, and an explosion occurred which killed the superior workman and injured the plaintiff who was assisting the other, it was

held that the workman injured had no right of compensation from the employer, in the absence of any evidence as to the case of the accident, or that the employer was in fault by having hired a careless or unskilful workman. *The St. Lawrence Sugar Refining Company & Campbell.* M. Judgment reversing, 21 March, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 290. 4 Dec. d'A. 186.

The defendants were constructing a building in the City of Montreal, and at their solicitation, men (of whom the plaintiff was one) were sent by the corporation to introduce water from the street by a pipe connecting with the building. This could not be done without working inside as well as outside. A man passing along the wall, above where the Plaintiff was working at the pipe hole, loosened and started a brick in the wall, and the brick, falling down, injured the Plaintiff. A hammer had fallen previously and warning had been given to the men above.

Held:—That the burden of proof was on the Defendants to rebut the presumption of negligence, and this not having been done, the Defendants were liable. *Evans & Monette.* M. Judgment confirming, 27 January, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Cross, JJ., dissenting. Rep. M. L. R. 2 Q. B. 243 9 Leg. News 366.

M., the husband of plaintiff, was employed by the Defendant, master of a steamship, to assist in unmooring the steamship then lying at the wharf at Montreal, and about to put to sea. While M. was standing ready to cast off the stern hawser from the post at which it was fastened, the hawser snapped, and M. was fatally injured.

Held:—That the presumption was that the rope was insufficient for the purpose for which it was being used, or that the ship was unskilfully handled, and in either case, the master of the ship was responsible. *Corner & Byrd,* M. Judgment confirming, 27 January, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, Cross, JJ., diss. Rep. 9 Leg. News 374.

An employer is responsible for injuries to his employees resulting from defects in the tackle, machinery or appliances provided for their use. Tackle used in work such as loading or unloading a vessel ought to be amply sufficient to withstand any strain that is likely to be put upon it by ordinary unskilled laborers ; and where tackle breaks, without any extraordinary strain upon it, it will be presumed to be insufficient, though it may have been used previously for the same purpose without accident.

A laborer engaged in work such as loading or unloading a vessel is only bound to use ordinary care, and the employer is not relieved from responsibility by showing that if the laborer had used the greatest skill and care the accident might not have happened. *Ross & Langlois.* M. Judgment confirming, 21 January, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R., I. Q. B. 280, 4 Dec. d'A. 187.

Par un engagement par écrit entre l'appelante Mlle O'Keefe et l'Intimé en cette cause, celui-ci s'est obligé à fournir de l'ouvrage (knitting) à l'appelante pendant l'espace de neuf mois depuis le 4 juin 1883. L'ouvrage n'a pas été fourni, et l'appelante réclame des dommages de l'Intimé pour inexécution de contrat.

Jugé:—1o. Que l'écrit en question ne mentionnant pas si l'Intimé devait apporter l'ouvrage chez l'Appelante ou si l'Appelante devait aller le chercher à l'établissement de l'Intimé, l'Appelante était tenue, d'après l'usage généralement suivi dans de semblables contrats d'aller le chercher chez l'Intimé, en temps utile, et que, comme elle ne s'est pas conformée à cet usage, elle n'a droit à aucuns dommages de l'Intimé.

2o. Que dans l'espèce la preuve testimoniale serait illégale pour suppléer à

cette lacune du contrat. *O'Keefe et vir., vs. Desjardins*, M. Judgdment confirming, 21 January, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 4 Dec. d'A. 300.

MATRIMONIAL ADVANTAGES.— The sequestration of the property of the community during the pendency of a suit for separation consented to voluntarily by the husband, is not an advantage to the wife, and the husband will not be allowed to have it set aside as such. *Crosbie & Blaiklock.* M. Judgment confirming, 27 January, 1876. Dorion, C.J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, Ramsay, JJ. dis.

MEASURE OF ACTIONS.— Samuel S. Campbell gave a mortgage for $ 25,000 to Lucy Jane Stevens, his wife, for the price of the stock in trade belonging to her in a partnership which had existed between her and one Charles Hagar, including from $10,000 to $11.000 interest on said price. Campbell, subsequently, gave a mortgage on the same property for $15,000 to Walter Bonnell; which mortgage, Bonnell transferred to the Appellant as collateral security for a note of $26,000, discounted on the same day, the bank receiving at the same time other collaterals to secure the payment of the note.

Campbell subsequently gave a mortgage to Brackley Shaw for $45,000.

Lucy Jane Stevens became a party to the deed and granted to Shaw a priority of hypothec over her own.

The action is by the Appellants as creditors under the transfer of the hypothec from Bonnell, to set aside and annul, as illegal and void, the hypothec given by Campbell to his wife, and the priority given by the latter to Shaw.

As the Appellant had been paid the full amount of the note of $26,000 for which the hypothec of $15,000 had been transferred as collateral security only, the Appellant had no interest to contest the hypothec given by Campbell to his wife, and the priority given by the latter to Shaw.

The other questions raised were not decided by the Court.

But Dorion, C. J., held the hypothec given by Campbell to his wife was, under the circumstances, a transaction forbidden between husband and wife. and therefore null and void, and that the transfer by Bonnell to the bank of an hypothec to secure a note discounted on the same day, was null and void, as being contrary to the banking act 34 Vict., C. 5, S. 40, which forbids banks to advance on the security of real estate. *The Bank of Toronto & Perkins et al* M. Judgment confirming, 25 April, 1887. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 357.

MEDICAL PRACTITIONER.—A medical practitioner who maliciously and unnecessarily divulges the nature of the illness of a patient is liable in damages. *Hart & Therrien.* Q. Judgment reversing, 5 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R. 267. 2 Leg. News 202. 9 Rev. Leg. 579.

MEMORANDUM.—As to placing a fence interpreted to be a deed of exchange. *Libby & Wyman* M. Judgment reversing, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Bélanger, JJ. Taschereau, Ramsay, JJ., dis.

MINING LEASE.—A mining lease, even for 90 years, enregistered, will not give the holder of such lease right to oppose the sale of the lands, except it be subject to the lease. *Anderson & Tait et al.* M. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau. Ramsay, Sicotte, JJ

MINING RIGHTS.— *v.* LEASE.—GOLD MINES.

By the old law of France, which is in force in Canada, the right to minerals did not pass by a grant of lands to the grantee, without special words, but remained in the Sovereign.

The King of England, at the cession, succeeded to this right.

The Sovereign could grant the right to minerals to whomsoever he pleased, and in such case the owners of the soil had no right, except to an indemnity, for any damages they might suffer by the mining operation. *Regina & deLery et al.* Q. Judgment confirming, 7 Dec. 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby JJ. Rep. 6 Leg. News 402.

Respondent leased to Appellant the right to mine for asbestos on certain property belonging to Respondent. Subsequently Respondent agreed to decrease the amount of royalty he was to receive; but to what extent Appellant and Respondent could not agree. Appellant kept no regular books, but his son-in-law and agent, at all events for some purposes kept full accounts and appellant was in the habit of referring those who dealt with him to this agent, and he had even paid Respondent on the statements of this agent. *Held*, that the Appellant was bound by the statement of account of such agent, the amount so fixed being less than Respondent would be entitled to under the law. *Jeffery & Lamb.* M. Judgment confirming, 30 June, 1886. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Baby, JJ. Cross J. dis.

MINORITY.—Persons of either sex remains in minority until they attain the full age of twenty-one years. 246 C. C.

Emancipation only modifies the condition of the minor. It does not put an end to the minority nor does it confer all the rights resulting from majority. 247 C. C.

MINORS.—It is only in case of necessity that the Court will authorize the sale of the real estate of minors. And where such necessity does not exist the Court will refuse such order, although a majority of the family council advise the sale. *Béliveau & Chevrefils.* Q., 5 Sep., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 2 Q. L. R. 191. 9 Rev. Leg. 664.

The father of minors, legatees under a will, cannot exclude the testamentary executor from the possession of the moveable property of the succession, even for the use of the minors. *Normandeau & McDonnell.* M. Judgment confirming, 27 May, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

MIS EN CAUSE.—*v. Timmons et al, & Cross.* M., June, 1875. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ., dis. *Walker & Sheppard & Labelle.* M., September, 1876. Monk, Ramsay, Sanborn, Tessier, JJ.

MISNOMER. — The name of respondent was "Thomas J.", and not "Thomas" as in the writ and declaration. *Held*, confirming the judgment of the Court below, that this was not such a misnomer as to give ground for an exception *à la forme. Kearn & Maloney.* Q. 7 December, 1877. Dorion, C. J., Monk, Tessier, Cross, JJ. Rep. 1 Leg. News 43.

MISREPRESENTATION.—*Fire Insurance.*—Insuring a building warranted to be used as a grocery and dwelling, in which there is no bar, but where under licence spirituous liquors are sold by the glass as in a tavern is not a misdescription. amounting to misrepresentation. *The Canada Fire & Marine Insurance Co. & Parent.* Q. Judgment confirming, 4 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis.

MISTRIAL—*v.* CRIMINAL LAW.

MITOYEN WALL.—Where the Plaintiff's wall is not plumb but leans over his neighbour's land and the neighbour also builds a wall which following the inclination of Plaintiffs wall, is raised above it, and is terminated so as to make it appear plumb, an action will be dismissed which claims indemnity from the builder of the second wall. *Quinn & Leduc.* M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 6 Leg. News 287.

Wall—Dividing.—Alleged encroach-

ment. *Quinn & Leduc.* M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 6 Leg. News 287.

Campbell & McKinnon. — As to indemnity for superstructure, and meaning of "Heberge." M. Judgment confirming, 27 January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Ramsay, J., dis. as to works not existing when the Defendant settled with Plaintiff for superstructure.

If a neighbour builds on a wall which is not *mitoyen* without taking the preliminary proceedings required by law he will be guilty of trespass and the Court will condemn him to damages for such trespass to take down the building so erected.

But if by his plea the Defendant offers to pay for the use of the wall the Court will suspend its order to demolish the building, in order to give the Defendant time to take the proceedings by law required to authorize him to make the wall common. *Hart & Joyce.* M. Judgment reversing, 22 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 209. Confirmed in Supreme Court, January, 1877. Richards, Q. C., Ritchie, Strong, Taschereau, Fournier, Henry, JJ. 1 S. C. R. 321.

A proprietor cannot make a recess in the *mitoyen* wall without the consent of his neighbour, or in default of such consent, without having it established by *experts* what means should be employed to prevent the new works being injurious to the neighbour. *Stephen et al, & Walker et al.* M. Judgment reversing, 25 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Cross, J., dis. Rep. 6 Leg. News 286.

Action of damages for raising a console and for a declaration that the wall was *mitoyen*. The defendant tendered a small amount of damage in recognition of Plaintiff's right of action and said that moving up the console to the top of the wall did not alter its effect as a sign of *mitoyenneté*. The Court was of opinion that no substantial damage was done, and that therefore the tender was sufficient. On the other point the Court was with the Respondent. *Peacky et al, & O'Neil.* Q. Judgment confirming, 6 December, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 8 Leg. News 11.

MOBILIZATION.—A question of the effect of stipulation of *ameublissement* raised but judgment turned on another question. *Panet & Hamel et al.* Q. Judgment, 7 December, 1874. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

MONEY.—The Court of Appeal will not give an order for the payment of money before the report of distribution has been homologated in the Court below and until the contestation then is terminated. *Anger et al. & O'Meara.* M. Judgment rejecting motion, 22 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 104.

MONEY LOST.—The secretary treasurer of school commissioners being unable to cash a government's cheque given to him for school purposes, handed it to the chairman of the commissioners to be cashed. The money was lost by the chairman or stolen from him. *Held*, that the secretary treasurer was not liable for the amount, as he had taken reasonable care of the cheque and was in no way in fault *Ouimet & Verville.* Q. Judgment confirming, 4 Dec., 1880. Sir A. A. Dorion, C.J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Q. L. R. 34, 1 Dec. d'A. 66.

Where the debtor pays into the hands of the bailiff, who has in his hands an opposition by another creditor setting up the deconfiture of the Defendant, it is the duty of the bailiff to pay the money into Court. *Martin & Kent et al.* M. Judgment confirming, 25 September, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ.

MOTION.—*v.* PROCEDURE.—OPPOSITION. —An opposition will be dismissed on motion if it be filed without the order

of a judge in conformity with art. 664, C. C. P. and 34 Vic., C. 4, S. 8, Q., amending it.

It will not be presumed that the publications required by law have not been made when the *venditioni exponas* shows proceedings perfectly regular on the face of it. *Delinelle & Armstrong et al.* M., 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 172 and 10 Rev. Leg. 315.

NOTE.—The date in the report in the *Revue Légale* is inexact, and Tessier, J., did not sit.

MOTION IN ARREST OF JUDGMENT.—v. JURY TRIAL.

MOTION FOR NEW TRIAL.—Ib.

MOTION. — *Judgment non obstante.* —Ib.

MOVABLES.—*Immovable by destination.*—The plant of a creamery, such as stillions of setting corks on puncheons, hogshead, casks, sleighs, refrigerators, is immovable by destination, and may be validly sold by the sheriff as part of the realty, although it be the separate property of another who does not oppose the sale. *Budden & Knight.* M. Judgment confirming, 3 Sep., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Q. L. R., 273.

MUNICIPAL CASES.—Municipal corporations, are political. They are contituted by particular charters or by the Municipal Code. They have a limited power to make laws, styled by-laws.

The by-laws of civil corporations have no general authority over those who do not explicitly or implicitly subject themselves to their operation.

Dues exacted by a by-law that is illegal, or illegally under a by-law made within the powers of the corporation may be recovered back. *The Corporation of the Town of St. John & Bertrand et al.* M. Judgment confirming

June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Art. 705 (1) of the Municipal Code cannot be so interpreted as to extend to by-laws made beyond the powers of the municipality, but must be interpreted to cover irregularities in the making of the by-laws within the powers of the municipality. So when a municipality exacted from a person the amount of a licence for the sale of spirituous liquors, under a by-law made in violation of the terms of a Statute forbidding municipal corporations to exact such licences the person paying for such licence may recover back the sum so paid. *La Corporation de la Ville de St. Germain de Rimouski & Rinfret.* Q. Judgment 4 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 115.

Corporations will be enjoined not to collect monies under an assessment roll informally made. *Morgan & Côté.* M. Judgment reversing, 22 June, 1889. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Sir A. A. Dorion, C. J., and Tessier, J., dis. Rep. 3 Leg. News 274.

And where money has been paid under such illegal assessment roll it may be recovered by action. *Lussier & Corporation of Village of Hochelaga.* Also *Valois & Commissaires d'Ecole pour la Municipalité d'Hochelaga.* Rep. *Ib.*, 227.

A municipal corporation may be called in *en garantie* by a proprietor whose land has been sold for taxes not due. *Wurtele et al. & The Corporation of the Township of Grantham.* Q. Judgment reversing, 5 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ., Sanborn, J., dis. Rep. 6 Rev. Leg. 547.

(1) Nevertheless every tax, contribution, penalty or obligation imposed by any bye-law subject to be annulled and payable before such bye-law was set aside, is exigible, notwithstanding the setting aside of such bye-law, if the petition on which such by-law was set aside was not presented to the Court within three months from the time such bye-law came into force.

The statute allowed the corporation to tax all pedlers or petty chapmen (*colporteurs ou marchands ambulants*) bringing for sale into the city any articles of commerce, &c. Under this authority the Appellants passed a by-law imposing a tax of $10 upon all strangers and non-residents, who should come into the said city to sell or offer for sale goods by sample, card or other marks. The Respondent, a commercial traveller, having offered goods for sale on sample, but made no sale, was condemned to pay the said tax, and distress was taken against his effects. He resisted the seizure, on the ground that the by-law was illegal, as being in restraint of trade, as discriminating between residents and non-residents, and as not following the terms of the sta tute.

Held, that the conviction was right, and the by-law valid and binding.

It is not necessary that the delegated power to pass a by-law for a particular purpose be exercised in the express terms of the law; it is sufficient if the terms of the statute be substantially followed, and in the present case the Respondent was within the fair meaning and intent of the Act a *colporteur* and *marchand ambulant*. And it made no difference that he did not sell, but only offered for sale.

Discrimination in taxation, as between residents and non-residents, is only an objection when it is unjust and oppressive, which was not the case with the by-law in question. Nor was it a by-law in restraint of trade. *Corporation of Three Rivers & Major*. Q. Judgment reversing, 7 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice & Cross, dis. Rep. 8 Q. L. R. 181. 11 Rev. Leg. 238.

The Corporation of Three Rivers is authorized to seize and sell the moveables of any proprietor for the tax for water supplied to the lessee of such proprietor. *The Corporation of Three Rivers & Malhiot*. Q. Judgment reversing, 7 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Cross and Baby, JJ., dis.

A municipal corporation is authorized to amend its assessment roll without being called upon so to do. Art. 734 (1), C. M.

And such corporation may cause to be estimated for the purposes of taxation the buildings, works, machinery and improvements on the property. Art. 719 (2), C. M. *Montreal Gas Co. & The Corporation of The Village of Hochelaga*. M. Judgment confirming, 17 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A corporator who alleges that he is suffering an actual injury from the unauthorized acts of a corporation may institute an action in his own name, without the intervention of the Attorney-General, to restrain such unauthorized action.

But the enactment of a by-law by a corporation, which by-law was only to take effect after being ratified by the municipal electors, cannot support such action by a corporator before the by-law has been ratified.

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(1) The local council must within thirty days next after the notice given in virtue of Art. 732, examine and amend the valuation roll deposited by the valuators, even though no petition or complaint is made in reference thereto by making the valuation of any taxable property which may have been omitted, and by inserting therein such omitted property with its value and all other particulars relating thereto required by art. 718, by striking therefrom any property erroneously inserted therein; by fixing at such sum as it think reasonable any valuation of taxable property which he judges to have been made under or above its true, real or annual value, or by correcting the names of persons entered therein, or the description of the lands mentioned therein, or by inserting therein whatever the valuators have omitted to insert.

(2) The actual value of the taxable real estate includes the value of all buildings, factories or machine shops erected thereon, and of any improvements which have been made thereto, save in so far as is set forth in the two following articles.

Section 54 of 14 and 15 Vict., c. 128, restricting the borrowing powers of the Corporation of Montreal to £150,000, does not apply to subscriptions for railway purposes.

A by law of the Corporation of Montreal, for taking stock in a railway, was properly submitted to the qualified electors generally, (under 35 Vict., C. 32, s. 2) the provision of the Municipal Code, Art. 497, not applying to cities and towns incorporated by special Act.

The Act of the Quebec Legislature 36 Vict., c. 49, was not unconstitutional. *Molson & the Mayor, &c., of Montreal.* M. Judgment confirming, 27 Jan., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ., Monk and Ramsay, JJ., did not concur in all the *considerants* of the judgment. They thought that the by-law, illegal in the commencement, had been rendered valid by the subsequent legislation. They were therefore of opinion that costs should not be given against the Appellant, at all events in the Court below. Rep. 23 J. 160, 9 Rev. Leg. 650.

The powers of a municipal corporation to expropriate must be exercised in conformity to law *à peine de nullité.* So the formalities prescribed by a Statute for the opening of a road, and for the expropriation of the owner, must be followed, and a municipality failing to observe such formalities will be condemned to restore the land, and pay damages, although the formalities neglected have been observed after action brought. That the right of a corporation to enter upon lands depends on the prior evaluation. *The Corporation of the Township of Nelson & Lemieux.* Judgment confirming, 16 September, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 2 Q. L. R. 225.

The general power conceded to a municipal corporation to expropriate for the purpose of opening streets, is not be interpreted so as to over-ride a statutory power, previously conceded, to hold certain land for the purposes of a work of public utility, such as a bridge.

The Mayor, &c., of Iberville & Jones et al. M. Judgment confirming, 22 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 277.

The corporation of the City of Montreal is liable for an accident caused by the bad state of the foot-path of one of its streets. *Dame Grenier & The Mayor et al. of Montreal.* M. Judgment reversing, 15 September, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. 21 J. 296.

NOTE.—By this case it would seem that the case of *O'Neil and Le Maire de Québec* is over-ruled. *v.* 16 L. C. R. 404.

The corporation of Montreal is liable in damages for closing a street, by which access to the property of the Plaintiff was rendered notably and in a special manner more difficult. *The Mayor et al. of Montreal & Drummond.* Taschereau. Ramsay, Sanborn, Mackay, Torrance, JJ. Mackay, Torrance, JJ. dis. Rep. 18 J. 225.

NOTE.—This judgment was reversed in the Privy Council, on the ground that the claim, if any existed, must be urged before the special tribunal of commissioners, appointed to value damages occasioned by expropriations. Their Lordships, however, incidentally expressed the opinion that the statutory power to close a street, not being made specially subject to damages, the corporation was not bound to indemnify the proprietor. In a later case, *Bell & The Corporation of Quebec,* the judicial committee explained, that they did not mean to say that if access to a property were cut off damages could not be recovered from a corporation having an unqualified power to do the act complained of. This court has not considered itself bound by these *dicta* of the Privy Council. On the question of jurisdiction the commissioners are not a tribunal and therefor going before them is merely a form of procedure, which may be omitted expressly or impliedly by the parties. In addition to this, there is nothing better established in our law, than that the jurisdiction of

the ordinary tribunals is not taken away by the mere fact of a special exceptional tribunal being appointed, unless the intention of the legislature to limit the ordinary jurisdiction is clearly expressed. The second point was not formally decided, and the case of *Bell & The Corporation of Quebec*, explanatory of the above case, relies on a distinction which has no foundation in our law. Depriving a party of the egress from and ingress to his property which he has hitherto enjoyed, is a very manifest expropriation; but there are others, such as making a street an *impasse*, close to a man's door. The opinion expressed in the case of *The Mayor of Montreal & Drummond*, did not really turn on any distinction between *enclave* and *impasse*, but on the general principle, that a person is not liable in damages for doing what the law permits him to do. On this point there has never been a question "*nemo damnum fecit, nisi qui id fecit, quod facere jus non habet nullus videtur.*"

The City of Montreal raised the level of a street within the city, so as to damage the property of the plaintiff. An action of damages was dismissed, under article 2261 C. C. (1) The Court of Appeal maintained the plaintiff's right of action in the ordinary courts, and that the damage complained of being continuous in its nature, and there being no special plea or evidence to show when such damage occurred or ceased, the two years prescription was not applicable. *Grenier et al. & The City of Montreal.* M. Judgment reversing, 3 Feb., 1880. Sir A. A. Dorion, 25 J. 138. 3 Leg. News 51.

A municipal corporation has power to make a transaction. *Bachand & La Corporation de St. Théodore d'Acton.* M. Judgment reversing, September, 1874. Monk, Taschereau, Ramsay, Loranger, Beaudry, JJ. Dis. Monk & Beaudry, JJ.

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(1) The following actions are prescribed by two years.—2o. For damages resulting from offences and quasi-offences whenever other provisions do not apply.

La Cour Supérieure a juridiction pour connaître d'une poursuite, pour le recouvrement d'une somme excédant $200, pour travaux faits pour une corporation municipale sur des chemins aux frais du propriétaire, et ce, nonobstant les articles 398, 401, 951 et 1042, C. M. *Ross & Corporation of St. Clotilde.* Q. Judgment confirming, 8 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11 Rev. Leg. 520.

Where an action is brought against a Municipal Corporation for damages suffered owing to the road not being kept clear of snow, the action is not demurrable because it does not allege opposite what lot of land the damage was sustained. *Patrick & Corporation of L'Avenir.* Q. Judgment reversing.

A municipal corporation obliged to keep up a fence on a railway-road is liable in damages to the neighboring proprietor for not doing so. *Seneca & Corporation of County of Chambly.* M. Judment confirming, 26 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A railway company was permitted, by the act incorporating it to pass its line through certain streets of the city of Quebec, with the consent of the corporation of Quebec, so as to guard the inhabitants thereof, and their property from injury, from the location or construction thereof,' 16 Vic., c. 100, sect. 3. The municipal corporation granted leave to the railway company to pass their line in a street where respondent had property, to his great damage. Respondent sued the corporation for indemnity. *Held*, that the corporation was not liable. (1) *Renaud & Corporation of Quebec.* Q. Judgment reversing, May, 1884.

Part of the highway under the charge of the trustees of the Montreal turnpike works, was interrupted by works authorized by Statute to alter the Montreal water works, and the Corporation of Montreal made a temporary road to keep up the communication of the turnpike road. This temporary

communication was defective, and a cabman's horse and vehicle were injured there. *Held*, that the Turnpike Trust was liable for the damages. *The Trustees of the Montreal Turnpike Roads & Daoust.* M. Judgment confirming, 21 Sept. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, Cross, JJ. dis. Rep. 23 J. 175, 9 Rev. Leg. 651.

Where works for the construction of a railway, authorized by statute, passing in the street of an incorporated town, injure the property of an individual, his action for damages will lie against the railway company and not against the Municipal Corporation. *Lambert & The Corporation of Three Rivers.* Q. Judgment reversing, 5 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dissenting. Rep. 10 Rev. Leg. 359. Also *The Corporation of Three Rivers & Lessard*, decided same day. Rep. 10 Rev. Leg. 441.

An action will lie against a municipal corporation for the bad state of a road under its control owing to railway works carried on under a statute, and the contractor may be called in as *garant. McGreevy & The Corporation of Three Rivers.* Q. Judgment confirming, 8 Sept., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dissenting thought the corporation was not liable, as was held in the cases of *Lambert & The Corporation of Three Rivers*, and *Lessard* against the same corporation, and that therefore there was nothing to *garantir*. Secondly, that if the contractor was acting under the statute, and within its powers, the railway company and not he, was liable, unless the contractor had agreed to pay the damages necessarily arising from the works, which did not appear to be the case.

Where a right of action exists and the court of first instance has allowed trifling damages, (in this case $12) although no actual damages were proved, the Court of Appeals will confirm the judgment. *The City of Montreal & Workman.* M. Judgment confirming, 21 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Routhier, JJ.

A party who seeks damages from a municipal corporation for injury to his houses from the bursting of a water pipe or the overflow from the hydrant must show that the damage he has sustained is the direct and probable result of the overflow. *L'Avenir & The City of Montreal.* M. Judgment confirming, 16 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Action of damages against the Corporation of Montreal for failing to carry out the stipulation of a deed of cession, by which Plaintiffs ceded to the said corporation, Defendant, the land of an unrecognized street, on condition that the said corporation should *faire sans délai, de la dite lisière de terre, une rue publique, sous le nom de la rue Lusignan, et devant être ainsi nommée à perpétuité, macadamisée, entretenue en aussi bon état et condition que les autres rues publiques de la dite cité.* The Court made an interlocutory order to the effect that the corporation should perform its part of the agreement within six months. Plaintiffs appealed, and the appeal was dismissed. *Roy & The Corporation of Montreal.* M. Judment confirming, 27 January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Expropriation. — Where a statute has given parties expropriated the right to sue for increase of indemnity, over that fixed by the Commissioners' award, the Court is bound to weigh the evidence presented in support of the action, and to increase the indemnity if the evidence is such as to sustain the claim for increased indemnity. *Bagg et al. & the Mayor, &c., of Montreal.* M. Judgment reversing, 17 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 136.

In an action for indemnity for land taken for the Montreal Mountain Park, the Plaintiff can go into the full evidence of the value. And the true value of land of that sort will be its price in

the market. *The Mayor, &c., of Montreal & Morrisson et al.* M. Judgment reversing, 22 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ., Monk and Ramsay, JJ., dis. Confirmed in Privy Council.

The formalities prescribed by the statute for the opening of a road, and for the expropriation of the property of individuals, must be rigourously followed and are *à peine de nullité.* And a municipality falling to observe the land expropriated, and to pay damages, notwithstanding the neglected formalities have been observed after action brought.

The right of a corporation to enter upon expropriated property depends upon the *prior* evaluation. *The Corporation of the Township of Nelson & Lemieux.* Q. Judgment confirming, 16 Sep., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 2 Q. L. R. 225.

Where the notices by posting on each lot of land liable to expropriation have not been given, as required by Sec. 176, s. s. 2, 37 Vict., c. 51, the assessment roll will be set aside, and all further proceedings against Plaintiff as regards the assessment will be stopped. *Demers & The City of Montreal.* M. Judgment reversing, 20 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 2 Leg. News 226.

Inequitable exercise of a Municipal Franchise.—A street Railway Company authorized by statute (24 Vict. c. 84) to construct a track upon and along the highways in the parish of Montreal, leading into the streets of the City "and to use and occupy any and such "parts of any of the streets or high-"ways aforesaid as may be required "for the purpose of their railway track "and the laying of the rails and the "running of their cars and carriages," exceeds its powers by laying the track on one side of a highway, within six feet from the line of the adjoining property, the value of which was thereby greatly diminished. Where a right of passage is given it should be exercised *ex æquo et bono,* in accordance with the use and destination of the highway, so as to cause as little inconvenience as possible (compatible with the exercise of the privilege) to the public, and the adjoining proprietors. And, in the present case the track should have been constructed on the part of the highway used by vehicles, and not on one side thereof used by persons on foot, and where the running of the cars interfered with access to the adjoining property.

Neither the trustees of the Montreal Turnpike roads, nor the municipality of the parish, had any right to authorize the laying of the track of the railway on one side of the highway, so as unnecessarily to injure the adjacent property. *Ross & City Passenger Railway Co.* M. Judgment reversing, 16 Sept., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 60.

An injunction to prevent the Corporation of Montreal proceeding to the sale of the goods of a wife in execution of a judgment against the husband will be maintained. And the goods of the wife in the common domicile will not be considered as goods in the possession of the husband. *The City of Montreal & Greene et vir.* M. Judgment confirming, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 2 Leg. News 170.

Under the Statutes regulating the Corporation of Montreal, indemnity is due for any act of the Corporation, although authorized by Statute, which expropriates or directly injures a proprietor or his property.

The 27th and 28th Vict. c. 60 only regulates a mode of procedure by commissioners, and it would seem that it only applies to such proceedings as are provoked by the Corporation. *Dame Julia Morisson & The Mayor &c of Montreal.* M. Judgment confirming, 21 December, 1880. Monk, Ramsay, Baby, Doherty, Jetté, JJ. Rep. 25 J. 1. 4 Leg. News 25. D. C. d'A. 107.

The owner of property through which

the Municipality opens a front road is bound to make the fence separating his property from such front road at his own cost, and that this rule applies to cases as well before as since the coming into force of the Municipal Code. *Whitman & The Corporation of the Township of Stanbridge.* M. Judgment confirming, 29 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby JJ. Ramsay, J., dissenting. Reported 26 J. 144, 4 Leg. News 406, 2 Dec. d'A. 112.

Toll bridges.—The Act of the Legislature of Quebec, 32 Vict., cap. 15, sect. 190, authorizing the Lieutenant Governor in Council to declare forfeit (for default to make repairs) the right of collecting tolls on any toll bridge, and to transfer the property therein, was within the powers of the local legislature, and that the Orders in Council mentioned in this case, forfeiting the right of exacting tolls for passing on a toll bridge which had been placed under the management of the Municipal Council of Cleveland and Melbourne (Appellants) by order of the Executive Council of the former Province of Canada, and transferring the control of the property to the Appellants, were not *ultra vires. Municipality of Township of Cleveland & Municipality of Township of Melbourne & Brompton Gov.* M. Judgment reversing, 26 February, 1881. Sir A. A. Dorion, Monk, Ramsay, Cross, Baby, JJ. Rep. 26 J. 1. 4 Leg. News 277. 1 Dec. d'A. 353.

A deed of sale to a Municipal Council for the use of the municipality for an object within the scope of the powers of the council binds the corporation.

The suit being in the name of Homer Baker and not in the name of the Babcock Manufacturing Company the other party to the contract is at most a question of signification.

Semble article 1738 C. C. (1) applies, the Babcock Manufacturing Company being a foreign principal.

The name being in the contract "Omer & Baker" instead of Homer Baker is immaterial.

The purchase being with a credit of six months and interest at 6 per cent. while the resolution authorising a councillor to pay cash is not a substantial variation from the authorisation—the delay being an advantage stipulated in favour of the corporation.

By article 463 M. C., village corporations are specially authorized to make provision for the extinction of fires and therefore the council in purchasing a Babcock was acting within its general powers.

There is no principle which prevents a corporation buying on credit.

After an article has been received it is not sufficient to resiliate the sale to prove that it does not meet all the expectations of the purchasers, and that they do not use it. It must be proved that the machine is so worthless as to make its sale on the part of the vendor amount to a fraud. *Corporation of the village of L'Assomption & Baker.* M. Judgment confirming, 20 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 4 Leg. News 370.

Procès verbal of Municipal Council.—An appeal lies to the county council from the homologation of any *procès verbal* of a rural municipality, within thirty days of the notice of homologation. (926 M. C. and 819.)

By article 100 of the same code, any *procès verbal* may be set aside by the Circuit Court. There is no appeal from a decision of the County Council sitting

(1) A factor whose principal resides in an other country is personally liable to third persons with whom he contracts whether the name of the principal be known or not. The principal is not liable on such contract to the third parties unless it is proved that the credit was given to both principal and factor or to the principal alone.

in appeal. (1061, 2 M. C.) But there is nothing which limits appeal from a judgment of the Circuit Court sitting in appeal on a *procès verbal* homologated. It is a judgment of the Circuit Court and falls within the operation of article 1142 C. C. P. *McLaren et al. & The Corporation of the Township of Buckingham.* M. Judgment reversing, June, 1875. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Sanborn, J. dis.

A corporation having power from the legislature to alter the pavements from wood to stone is not obliged to enter on this alteration simultaneously.

The Appellant having obtained the improvement of her property and paid for it without objection, cannot avail herself of slight irregularities to recover back the assessment.

The by-law was sufficiently precise although it did not state the width of the flatstone work in each street. *Bain & The City of Montreal.* M. Judgment confirming, 19 January, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 76, 2 Dec. d'A. 221.

In a suit by a Municipal Corporation it is not necessary to produce the resolution of the council authorising the action. *Blouin et La Corporation of St. Valier.* Q. Judgment confirming, 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Dec. C. d'A. 147.

Within the scope of its functions and without fraud, a municipal council may make a purchase on credit, when it has not *cash* in hands to pay for the article required, and although no means are provided by assessment or otherwise to pay for it, and thus bind the corporation. Art. 663 M. C. gives general authority to village corporations to purchase fire-engines and means for the extinction of fires. *Corporation of the Village of l'Assomption & Baker.* M. Judgment confirming, 20 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Leg. News 370.

Under art. 100 of the M. C. every elector has a right to proceed before the Circuit Court with regard to any valuation roll. And there is appeal from any judgment of the Circuit Court when the amount in litigation exceeds $100. *Blackburn & The Corporation of Chateau Richer.* Q. Judgment reversing, 5 Oct., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A District Magistrate has jurisdiction over cases for the collection of municipal taxes, no matter to what amount And under articles 939 and 951 of the above Code, a local corporation may be sued before the District Magistrate for the recovery of a debt of the county due by the local municipality. *La Corporation de la Paroisse de St. Guillaume & La Corporation du Comté de Drummond.* Q. Judgment confirming, 5 December, 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 7 Rev. Leg. 562.

A judgment of the Circuit Court in a proceeding under article 100 M. C. is susceptible of appeal to the Court of Queen's Bench. *Ralf et al. & The Corporation of the Township of Stoke.* M. Judgment reversing, 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 22 J. 213.

Municipality. — County.—A county municipality has no direct action against a taxpayer of a municipality for taxes due to the county municipality by the local municipality, the recourse of the county municipality being against the local municipality. *Roberge & The Municipality of County of Levis.* Q. Judgment reversing, 5 December, 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 7 Rev. Leg. 642.

A secretary-treasurer of a scholar, cannot bring an action for a block sum due him until he has rendered an account. *Dorais & The School Commissioners of Warwick.* Q. Judgment confirming, 6 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 161.

A municipality will be obliged to pay

a promissory note signed by the Mayor and the Secretary in the name of the Corporation, where it is neither alleged nor proved that the note was given without lawful consideration. *The Corporation of the Township of Grantham & Couture & al.* M. Judgment confirming, 16 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 105, 2 Leg. News 350, 10 Rev. Leg. 186.

A municipality is liable for damages incurred by the bad state of a municipal road, although by the arrangements between the proprietors and the municipality, the former are bound to keep the road in order.

A man having drunk so as to be excited will not discharge the municipality of its liability for damages arising from the bad state of a municipal road unless it can be shown that the condition of the Plaintiff was the cause of the accident. *Martin & The Corporation of the Township of Ascot.* M. Judgment reversing, 20 June. 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 2 Leg. News 227.

A municipal corporation is not liable for damages caused in making necessary works, and there is no obligation on the part of a corporation to make drains, where none have existed before, unless by their works they alter the natural flow of water so as to make such drain necessary. *Riopel & The City of Montreal.* M. Judgment confirming, 17 September, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 320.

MUNICIPAL DEBENTURES.—It is no answer to an action on municipal debentures that the debenture is for $100 instead of for $500, or that the date of the by-law was erroneously stated as being of the 18th March, 1878, instead of being of the 18th May, 1871. *The Corporation of the Township of Roxton & The Eastern Townships Bank.* M. Judgment confirming, 28 November, 1882.

MUNICIPAL COUNCIL.— *Appeal.* — There is no appeal to the Circuit Court from a décision of a municipal council as to the revision of electoral lists. The appeal is to a judge of the Superior Court. *St. Henri & Viau.* M. Judgment reversing, December, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

The 34 Vic., c. 40, sect. 27, enacts that when the militia is called out in support of the civil power in any municipality, the municipality shall supply proper lodging. Section 38, empowers the governor general in council to make regulations for billeting and cantoning of troops and militia. In 1870, the governor general fixed the rate of billets for each foot soldier at 10 cts. The militia being called out in support of the civil power at Quebec, out on two occasions, once in 1878 and again in 1879. the troops were not billetted, but were lodged in the Skating Rink, and the Appellant sued the corporation of Quebec on an account for use and occupation. *He d.* reversing, that the tender by Respondent was an admission of its responsability to pay for the use and occupation of the rink by the troops as an equivalent of the obligation to quarter them. Q. Judgment, 7 May, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dissenting, thought the amount of the liability was determined by the order in council fixing the billet at 10 cents per man, that the corporation should have been called on for a specific billet for so many men, that if this was not or could not be done, the expense not being within the exception of the statute, fell on the government of Canada, that the admission so far as it went, only applied to the calling out in 1878, and that in fact it applied to neither, but was an admission only that equitably the corporation should pay something, what the corporation was obliged to pay, was not the worth of the Skating Rink for a night but the billet of so many men. It was argued that the men had to be kept together at night to be in readiness, providing for that is not the obligation to billet.

A municipality is liable in damages for passing an illegal by-law abolishing a public road. *The Corporation of*

Ireland & Coleraine. Q. Judgment confirming, 8 May, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., doubts as to there being an action against a municipal corporation for passing an illegal by-law and dissents as to the amount of damages which are excessive.

The formalities prescribed by the Municipal Code with reference to a collection roll must be strictly followed, as in the case of an *acte de répartition* annexed to a *procès verbal*, and where such formalities have not been observed the taxes thereby imposed are not exigible and a sale of land for arrears of such pretended taxes will be annulled.

Where the taxes are illegal in consequence of there being no valid collection roll in existence, acquiescence will not give validity to such assessment. *La Corporation du village du Bassin de Chambly & Scheffer.* M. Judgment confirming, 24 November, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. M. L. R. I. Q. B. 42. 7 Leg. News 390.

Par acte du 4 Novembre, 1873, C. obtint du gouvernement fédéral une promesse de vente d'immeuble situé dans la cité de Montréal, dont la possession devait lui être donnée que sous certaines conditions mentionnées à l'acte. Le 25 Octobre, 1875, C. vendit et transporta à l'Appelant tous ses droits résultant de la dite promesse de vente. Les conditions stipulées ne furent remplies et la possession de l immeuble ne fut donnée à l'Appelant que le 1er Novembre 1876, et il n'obtint son titre que le 4 Novembre. Le rôle annuel de cotisation pour l'année civique commençant le 1er Mai, 1876, fut parachevé et déposé au bureau du trésorier de la cité le 28 Septembre 1876, et sur ce rôle l'Appelant était mentionné comme contribuable pour l'immeuble en question.

Jugé: 1o. Que les taxes municipales dans la cité de Montréal ne sont pas payables jour par jour, mais sont indivisibles, et sont dues par le propriétaire et possesseur de l'immeuble sujet à cotisation au temps de l'imposition de ces taxes.

2o. Que l'Appelant n'est devenu propriétaire de l'immeuble en question que le 4 Novembre 1876, et que le gouvernement fédéral en a été le propriétaire jusqu'à cette date.

3o. Que par conséquent, les propriétés du gouvernement n'étant pas sujettes aux taxes municipales, l'immeuble en question n'était pas susceptible d'être taxe le 28 Septembre 1876, date de la mise en vigueur du rôle de cotisation pour l'année civique commençant le 1er Mai 1876, et l'acquisition subséquente de l'immeuble par l'Appelant ne l'a pas rendu contribuable pour aucune partie des cotisations pour cette année.

4o. Que le fait que l'Appelant avait été cotisé et taxé sur le rôle de cette année, et qu'il ne s'en était pas plaint de la manière réglée par la charte de la cité, ne pouvait pas le rendre contribuable pour ces taxes. *Hogan & La Cité de Montréal.* M. Judgment reversing, 19 November, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. M. L. R. I. Q. B. 60. 7 Leg. News 378.

Although it is within the attributes of municipalities to make by-laws and *procès verbaux* for the opening of water-courses and a person injured thereby may have exercised his right of appeal to the county council and the *procès-verbal* has been confirmed by the county council, nevertheless such confirmation is not a bar to an action to set aside the *procès-verbal* where it orders something to be done which is in itself contrary to law. And so, where the effect of a water-course established by *procès-verbal* was to aggregate greatly the servitude which the Plaintiff's land had to bear owing to its being lower than that of his neighbours, it was *held*, that he was entitled to bring suit to have the *proces-verbal* set aside, although he had appealed previously

to the county council and the *procès-verbal* had been confirmed thereby. *La Corporation de la Paroisse de Ste. Anne du Bout de l'Isle & Reburn.* M. Judgment confirming, 26 Nov., 1884. Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dissenting. Rep. M. L. R. I Q. B. 200. 4 Dec. d'A. 192, 8 Leg. News 67.

Where an action had been brought by one of several persons assessed for the cost of a special improvement, to set aside the assessment roll, that any other person assessed for the cost of the same improvement had an interest which entitled him to intervene if the original plaintiff abandoned the case.

Where an action was instituted before the expiration of the delay fixed by a statute for contesting assessment rolls, the right of an intervenant taking the same conclusions as those of the original action was not barred, though the delay had expired before the intervention was filed.

Under the Statute 31 Vict. (Q), ch. 37, it was necessary that the Commissioners appointed to carry out an expropriation, and to determine the parties interested therein and to be assessed for the purpose of the proposed improvement, should give public notice of their proceedings in the manner therein provided, and in the absence of such notice the assessment roll made by the Commissioners was null and void; nor could the subsequent homologation of the report of Commissioners by the Superior Court give validity to such proceedings. *Hubert & The City of Montreal.* M. Judgment reversing, 24 November, 1884 Ramsay, Tessier, Baby, JJ., and Doherty & Caron, JJ. *ad hoc.* Rep. M. L. R. I. Q. B. 237.

Aux termes du Code Municipal (34 Vict., c. 68, art. 19, § 3) les "municipalités locales" comprennent les municipalités de villages.

L'article 27 du même code ne fait

qu'indiquer quelles municipalités rurales seront considérées comme municipalités locales. sans égard aux municipalités de villages, qui tombent sous la règle générale établie par l'art. 19 § 3.

Par conséquent une compagnie dûment incorporée en vertu de l'acte 33 Vict. c. 32, avait le droit d'empierrer un chemin de front dans les limites d'une municipalité de village, d'y poser des barrières et d'y percevoir des péages.

En vertu du dit acte, une telle compagnie a le droit d'exiger un péage pour une fraction de mille parcourue, pourvu que sur toute la longueur du chemin parcouru le taux n'excède pas le montant par mille fixé par la cédule B du dit statut. *La Cie du Chemin de Péage de la Pointe-Claire & Leclerc.* M. Judgment reversing, 9 December, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby JJ. Rep. M. L. R., I. Q. B. 296.

Petition on 4th May, 1883, by municipal electors to annull a by-law granting a bonus to a railway company under art. 698 M. C., which by-law came into force on the 20th April, 1883. The by-law was approved by the Lieutenant Governor on the 16th January and promulgated on the 4th April. The ground of petitioners' objection was that the by-law had not been submitted to the electors according to law. That a by-law was passed by the council on Sep. 11, 1882, that the by-law was published on the 14th September calling the meeting of electors to approve or disapprove it on the 8th October. That on the 16th September the council altered the by-law by changing the condition that the work should be finished on the 1st February, 1883, and sub-tituting therefor the 15th July, 1883. It was argued (*a*) that the by-law voted on was not the one passed, or advertised, (*b*) that if the by-law considered as being of the 16th September it was not advertised that a by-law of the 16th September could not be submitted to the electors on the 6th October, as that made only 19 days from

the 16th September. 673 M. C. (1) *Simpson et al. & The Corporation of St. Malachie d'Ormstown.* M. Judgment confirming, 26 November, 1884. *Held:* that no substantial injustice was done, —that the electors had acquiesced by voting and that the by-law had been approved by the Lieutenant-Governor in council without protest. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

The Corporation, appellant, had no power to take any of the respondent's land for a road, without fulfilling the formalities prescribed by the law for the expropriation of the land required for such road. The general reserve in the letters patent from the Crown is made in favor of the Crown only, and does not pass to the municipal authority. *La Corporation du Comté de Dorchester & Collet.* Q. Judgment confirming, 8 February, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Baby, J. diss. Rep. 8. Leg. News 156. 10 Q. L. R. 63.

La Corporation de la Cité de Québec ayant, en vertu du statut 29 Vict., ch. 57, le contrôle absolu des trottoirs dans la cité de Québec, elle n'a pas de recours en garantie contre le propriétaire, pour dommages résultant d'un accident arrivé par suite du mauvais état de son trottoir. *La Corporation de Québec & Langlois.* Q. Judgment confirming, 8 February, 1884. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 10 Q. L. R. 79.

Après le démembrement d'une municipalité et sa division en deux municipalités distinctes, tout le territoire formant ci-devant partie de l'ancienne municipalité, demeure affecté au paiement des anciennes dettes, et que le conseil de l'ancienne municipalité et ses officiers peuvent percevoir sur tout le territoire, des taxes imposées pour cet objet, et y imposer pour le même objet de nouvelles taxes basées sur la valeur des biens imposables d'après le rôle d'évaluation en force, dans la municipalité originaire, lors du changement de limites, comme si ce changement n'avait pas eu lieu.

La Corporation de l'ancienne municipalité a un droit d'action pour recouvrer ces taxes contre les propriétaires de ces bien imposables, mais que la corporation de la municipalité nouvelle ne peut être directement tenue au paiement de ces taxes, que dans le cas d'un acte d'accord entre les deux corporations, conformément à l'article 84 (1) du Code Municipal. *La Corporation de Notre-Dame du Sacré-Cœur & La Corporation de St-Germain de Rimouski.* Q. Judgment reversing, 6 December 1884. Sir A. A. Dorion C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 10 Q. R. L. 316. 7 Leg. News 407. 8 Leg. News 61.

Les corporations religieuses établies pour les fins de l'éducation, sont exemptes de toutes taxes municipales et scolaires, pour les propriétés par elles occupées pour les fins pour lesquelles elles ont été établies et qu'elles ne possèdent pas uniquement pour en tirer un revenu. *Les Commissaires d'Ecoles de St-Roch Nord & Le Séminaire de Québec.* Q. Judgment confirming, 4 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. 10 Q. L. R. 335. 8 Leg. News 83.

A contractor having to use a road within the limits of the corporation respondent found the road out of repair. He notified the corporation to repair which they neglected to do. He then repaired a bridge which was in a dangerous state and sued the corporation for the expenditure and damages sustained by the bad repair of the road. The corporation demurred, and the demurrer

(1) The day for which the meeting of municipal electors is convened must not be less than twenty days nor more than thirty days after the passing of the by-law by the Council.

(1) The Council bound to settle the joint debts and obligations may, by mutual agreement with the Council entrusted with the municipal administration of any other part of the territory liable for the payment of such debts and obligations, determine the total amount jointly due by all the owners or occupants of the taxable property comprised within such part of the territory.

was successful in so for as regards the repairs of the bridge, the court noting, that the law gave a mode of compelling a corporation to repair its highways and that a private person had no action for repairs. On the issue as to damages for the bad state of the road the parties went to issue and the court of first instance awarded substantial damages. The corporation took the case to Review and the Court of Review reversed the judgment awarding damages. The contractor then appealed from both judgments. The one dismissing the action for repairs, and the judgment as to the damages. The Court of Appeal maintained the judgment in Review. *Beaucage & The Corporation of Deschambault.* Q. Judgment confirming, 7 October, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice & Ramsay J., dissenting thought the judgment on the demurrer should be reversed; that in a case of absolute necessity, a private person was justified in repairing a high-road that was in a dangerous state, and if justified in so doing he might recover the cost from the municipality. They concurred with the majority of the court in thinking the damages complained of owing to the difficulty of carting too remote.

The jurisdiction of the Superior Court is not taken away by M. C. 100, (1) in actions to set aside a *procès-verbal* or resolution of a municipal Council.

The neglect to promulgate a by-law does not prevent a party interested from taking proceedings to set it aside.

Where a county council declares a local road to be a county road merely for the purpose of abolishing it, the Court will interfere and overrule such abusive exercise of power. *Corporation du Comté d'Arthabaska & Patoine.* Q.

(1) Any *procès-verbal* roll, resolution or other order of a municipal council may be set aside by the Magistrate's Court or by the Circuit Court of the County or District by reason of its illegality in the same effect as a municipal by-law, and is subject to the provisions of arts. 461 and 705.

Judgment confirming, 6 February, 1886 Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Sir A. A. Dorion, C. J., dissenting. Rep. 12 Q. L. R. 57. 4 Dec. d'A. 364.

Une répartition, basée sur un procès-verbal qui n'a pas été régulièrement homologué et dont les avis requis pour son homologation et sa mise en vigueur n'ont pas été donnés, conformément à la loi, est nulle comme le procès-verbal sur laquelle elle s'appuie.

En l'absence de tels avis, celui qui a à se plaindre n'est pas privé du droit de se pourvoir par action directe pour faire prononcer la nullité d'un tel procès-verbal, sans recourir à la procédure indiquée dans le Code Municipal. *La Corporation de Ste Clothilde de Horton & O'Shaughnessy.* Q. Judgment confirming, 6 May, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 14 Rev. Leg. 388.

A local council passed a by-law which was amended by the county council on appeal. The local council without new proceedings or any effort to amend, passed a by-law in similar terms to the former by-law which was then again taken to the County Council on appeal, when the following resolution was proposed and adopted:

"Attendu que la question en litige
"sur le présent appel a été réglée par
"le Conseil, en homologuant le procès-
"verbal de Louis Parent, en octobre
"dernier, et attendu que le Conseil
"Municipal de la Paroisse de St-David
"au lieu de mettre à exécution le dit
"procès-verbal, et de respecter la déci-
"sion que ce Conseil a adopté à sa ses-
"sion du sept Avril dernier, a passé
"un règlement mettant à néant la dite
"décision de ce Conseil.

"Que l'appel porté devant ce Con-
"seil par requête de Dolphis Lessard
"et autres, en date du douze Avril,
"soit maintenu et que le règlement
"dont est Appel, adopté par le Conseil
"Municipal de la Paroisse de St-David,
"adoptés à sa dite séance du sept avril
"dernier, amendant le dit procès-ver-

" bal de Louis Parent, soient et ils sont " par la présente résolution, cassés, an- " nulés et mis à néant à toutes fins que " de droit, avec dépens contre Régis " Crépeau, père, Magloire Crépeau, " Narcisse Durocher, Azarie Girouard, " et Olivier Crépeau, fils Régis, de la " Paroisse de St-David, qui ont par re- " quête en date du premier Mars der- " nier, sollicité du Conseil Municipal de " la Paroisse de St-David, la passation " du dit règlement, savoir, les Intimés " sur le présent appel." *Held*, reversing the judgment of the Court below, that the County Council in thus setting aside the by-law of the local council acted within its jurisdiction. *The Corporation of the County of Yamaska & Durocher.* M. Judgment reversing, 21 January 1886. Monk, Ramsay, Tessier, Cross, Baby JJ.

A by-road homologated as a charge on certain proprietors, without any special mention of the fences, afterwards adopted by the municipal council, and to be maintained at their charge, obliges the corporation to maintain the half of the fences with the proprietors through whose land it passes, if it is in a line, and the whole if it cuts a land. Arts. 535 and 775 M. C. *The Corporation of L'Avenir & Duguay.* Q. Judgment confirming, 7 October, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Cross, J. dis. on a matter of detail, 9 Leg. News 346. 14 Rev. Leg. 570.

The statute in question did not authorize the corporation of Levis to impose burdens upon the municipality which were not authorized by their acts of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained. *The Quebec Warehouse Co. & The Corporation of Levis.* Judgment reversing by Supreme Court, 12 January, 1885. Sir W. J. Ritchie, C. J., Strong, Fournier, Henry, Gwynne, JJ. Ritchie, C. J., *dubitante.* Rep. 11 Sup. Court Rep. 666.

Where a municipal council by a *procès verbal* subjects a proprietor to work more than double the average of the works of others having lands of equal value, the *procès verbal* cannot be set aside because the exemption of article 801 M. C., is not accorded, and a proprietor may, by a *procès verbal*, be compelled to make up the road across his land with broken stone, notwithstanding the art. *Reburn & The Parish of St Anne.* M. Judgment confirming, 27 May, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Cross, JJ. dis. Ramsay, J. dissenting held that that the article 801 M. C. was obligatory on the council and not facultative ; and that no proprietor could be compelled alone to make the high way at his charge of stone.

Where an action is unnecessary, the judgment in favour of Plaintiff will be maintained but without costs. *Schwob & Baker.* M. Judgment confirming, 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Un règlement, passé par un conseil local, accordant un bonus à une compagnie de chemin de fer, et auquel le conseil aurait, par une résolution, adoptée à une session spéciale tenue après la passation du règlement, changé la date de l'exécution d'une obligation imposée à la compagnie, ne sera pas annulé, s'il n'est pas constaté qu'une injustice réelle est résultée pour les requérants en cassation.

Un changement ainsi fait ne constitue pas un faux. *Simpson et al. & La Corporation de Ste. Malachie d'Ormstown.* M. Judgment confirming, 26 November, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J. dis. Rep. 14 Rev. Leg. 485.

A municipal corporation cannot validly bind itself to make a by-law for the opening of a street, and no action will lie against such corporation for failure to carry out an agreement for the opening of a street. *Brunet et al. & La Corporation du Village de la Côte St. Louis.* M. Judgment confirming, 26 September, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, C. J. Rep. M. L. R. II, Q. B. 103.

MUNICIPAL CODE.—v. TRESPASS.

MUTUAL INSURANCE COMPANY.—v. INSURANCE.

N

NAVIGABLE RIVER.—Navigable and floatable rivers and streams and their banks, the sea-shore, &c., are considered as being dependencies of the Crown domain. 400 C. C. (1).

The beach of a navigable river is not conveyed by an ordinary title of concession from the Seignior, and it remains part of the public domain.

The owner of the land facing the beach cannot contest the validity of Letters Patent of the government of Quebec conveying right over the beach of which he is not in possession. *Motz & Carrier.* Q. Judgment confirming, 7 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

NEGLIGENCE.—*Risk of calling.*—One of the hands on board the steamer, whose duty it was to overlook the operation of transferring goods to a passing steamer, fell over-board while this was being done, and before help could reach him he was drowned. His widow, for herself and children, sued the company in damages, attributing fault, inasmuch as there was only one cable used to attach the steamer instead of two, and that the captain had not used the necessary diligence after the man fell into the water.

Held, that there was no contributory negligence on part of the man (Paulet), that the operation was being performed in the ordinary way and with reasonable care, that Paulet had special charge of the work, that therefore there was no fault on the part of the company Appellant, Paulet having lost his life owing to the ordinary risk accompanying his calling. *Richelieu Navigation Co. & St. Jean.* M. Judgment reversing, 17 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dis.

Where the damage results from an accident, without fault on either side, the loss is borne by the party who suffers it; and when the suffering party alone is in fault, the loss is borne by him. So where a laborer employed in discharging railway iron through the hatch of a vessel, by his imprudence and disregard of orders, caused the breaking of a chain which was sufficiently strong for the purpose for which it was used, it was held that the damage which he suffered must be borne by himself alone. *Desroches & Gauthier.* M. Judgment reversing, 20 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep. 5 Leg. News 404. 3 Dec. d'A, 25.

Contributory negligence.—Beaupré & The Montreal Tow Boat Co. M. Judgment confirming, 2 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The corporation of Quebec having opened a hole in the street for certain repairs, or allowed it to be opened, is not responsible in damages to a person driving into the hole, which was not protected and no light kept burning at night, if the party was driving at the rate of eight miles an hour. *Gray & Mayor &c. of Quebec.* Judgment confirming, 5 June, 1871. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay, J., dis. said that to make contributory negligence two things were necessary. 1st there must be negli-

(1) Roads and public ways maintained by the state, navigable and floatable rivers, and streams and their banks, the sea shore, lands reclaimed from the sea, ports, harbors and road steads and generally all those portions of territory which do not constitute private property are considered as being dependencies of the Crown domain.

gence. 2nd the negligence must contribute to the accident. He did not think that driving at eight miles an hour was negligence, and it was not proved nor rendered probable that Appellant's carriage falling into a hole made in the middle of the road, would have been less, had it been going at the rate of six miles an hour.

NEGOTIABLE INSTRUMENT.—A note given to a Building Society as collateral security is not a negotiable instrument, and if lost does not fall within the terms of article 2316 C. C. (1) as to security. *Cooley & The Dominion Building Society.* M. Judgment reversing, 18 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 111. 1 Leg. News 495.

NEGOTIORUM GESTOR.—*v.* ACCEPTANCE.

NEW TRIAL,—*v.* JURY TRIAL.

Plaintiff sued under a policy covering goods in No. 319 St. Paul street. The jury included in their verdict value of stock belonging to Plaintiff, which was stored in No. 315 adjoining.

Held, error under the action as brought, and new trial ordered. *Citizens Ins. Co. & Rolland.* Judgment reversing, 14 Dec., 1878. Dorion, C. J., Monk, Ramsay, Cross, Tessier, JJ. Rep. 1 Leg. News 604.

Where a policy of Insurance was for goods on No. 119 St. Paul Street and the fire took place in No. 115 also in possession of the insured, and the jury finds for the insured, the verdict will be set aside and judgment will be entered up for Defendant. *The Citizens Insurance & Investment Co. & Lajoie.* M. Judgment reversing 24 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

(1) Payment of a lost bill of exchange may be recovered upon the holders making due proof of loss and also, if the bill be negotiable, on giving security to the parties liable, according to the discretion of the court.

A judge sitting alone on the crown side will not grant a new trial in a criminal case. *The Queen v. Dougall & others*, M. Judgment Q. B., Cr. side, 28 Sep., 1874. Ramsay, J. Rep. 7 Rev. Leg. 578.

NOMINAL PLAINTIFF.—A *cessionnaire* suing in the name of his *cedant* can prove that the release given by the nominal plaintiff was given in fraud, and to defeat the rights of the *cessionnaire. Paré & Vachon.* Q. Judgment reversing, 7 September, 1875. Dorion. C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Ramsay, J. dis.

NON-JOINDER.—A writ of Prohibition to prevent the Recorder's Court of the City of Montreal, from proceeding to execute a judgment in favor of the corporation will be quashed, the corporation not being made a party to the proceeding. *Beaudry & The Recorder's Court & al..* M. Judgment confirming. December, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

NOTARY.—*Commission to.*—The following condition was inserted in the *cahier de charges* of real estate intended to be sold by auction for the benefit of heirs: "The purchaser shall be obliged "to pay, over and above the price of "adjudication, at the time of the exe- "cution of the deeds of sale, to Theo- "dore Doucet, notary, four per centum "upon the price of adjudication, which "percentage will cover the notarial "legal commission, the auctioneer's "commission, and all necessary costs "and expenses incurred to effect the "sale of the said lots, and will also in- "clude the costs of the deeds of sale— "and of one copy thereof for the ven- "dors. and the costs of registration." The sale did not take place, and the property was bought in for the heirs, "a right to make one bid being re- "served to the vendors in the *cahier* "*des charges*, the respondent the re- "fore was under no liability to pay "anybody the amount of the commis- "sion, which was after all part and "parcel of the price; no part of which "was payable under the circumstan- "ces." *Doucet & Pinsonneault.* M.

Judgment confirming, 19 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 163.

A Notary whose *minute* is attacked *en faux*, and who has been a witness may appeal from the judgment maintaining the *inscription en faux*.

On judging this appeal his evidence will not be considered.

The alleged witness to the instrument will be considered as more trustworthy than the daughter of the notary who wrote part of the minute. *Defoy & Forte.* M. Judgment confirming, 20 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 36.

A notary who has been admitted as a witness on an *inscription en faux* against his own act, and who has declared in his deposition that he had no interest in the issue, may afterwards be allowed to intervene and carry the case to appeal in his own name from the judgment declaring his act *faux*. *Defoy & Forté.* Judgment.—Query as to the effect of his testimony.

Where two notaries, as witnesses, sign a conveyance of lands held in free and common soccage, their signatures must be proved like those of other witnesses. *Union Bank & Nutbrown.* M. Judgment confirming, 7 February, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Cross, J., dissenting. Rep. 11 Q. L. R. 217. 8 Leg. News 76. 14 Rev. Leg. 64.

That a deed, purporting to be the copy of a notarial copy of a *minute* that cannot be found among the deeds of a notary deceased, makes proof of its contents, if it appears that there was an original deed of that kind. *Lamontagne & Contant.* Judgment reversing, 13 Sep., 1874. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Rep. 6 Rev. Leg. 607.

NOTE EN BREVET. — *v.* DEMAND OF PAYMENT.

NOTE.—*v.* PROMISSORY NOTE.

NOTICE.—There should be notice of motion to reject an appeal from the Circuit Court, the record not having been returned. *Turcotte & Rioux.* Q. Judgment 4 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

NOTICE OF ACCIDENT.—Where damage is done by collision of two vessels, and one party is to blame he is not entitled to notice of the accident. He is bound to know his own act. *The Richelieu & Ontario Navigation Co. & Lafrenière.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 204.

NOTICE TO TENANT. — *When required to terminate lease.* — When a party holds property as a lessee by sufferance of the owner, the lease cannot be terminated without lawful notice. *Jeffrey & Ferns.* M. Judgment reversing, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a lease by a notarial instrument has been continued by *tacite reconduction*, a notice of three months is necessary to terminate it. *Webster & Lamontagne.* M. Judgment reversing, 21 Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 106.

NOTICE.—*v.* OPPOSANT.

NOTORIOUS INSOLVENCY.—*v.* INSOLVENCY.

NOVATION.—Notes given in payment of a judgment, under the promise that they were to be endorsed by a person named, who refused to endorse, create no novation, and the judgment creditor may execute his judgment after tendering back the notes so given. *Dawson & Desfosses.* Q. Judgment reversing, 5 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An incorporation under the statute 13th and 14th Vict., ch. 28, com-

menced on the 22nd July, 1854, and completed on the 24th February, 1855, was illegal.

Promissory notes, granted by a company so incorporated, during the period between July, 1854, and February, 1855, for goods sold and delivered by the Plaintiffs, and renewed by notes of the company after the completion of the incorporation (the old notes being surrendered and given up to the company) were, together with the original debt for the goods, novated and paid.

In the absence of fraud, in effecting the exchange of notes as above, the shareholders who paid up their stock in full, and caused the fact to be duly registered were free from all liability to pay said notes, or the original price of said goods. *Brewster & al. & Chapman & al.* M. Judgment confirming, 22 March, 1875, Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 301.

NUISANCE.—It is a nuisance to anchor a raft in the river St. Lawrence in front of the house of the proprietor of the bank of the river so as to cause him special inconvenience and damage, and to leave such raft there during a long space of time without necessity. *Dunning & al. & Girouard & al.* M. Judgment confirming, 16 March, 4877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 179.

NULLITÉ DE DECRET.—" A sale by " the Sheriff of Montreal, at his own " office, of land situated in the parish " of l'Enfant Jésus, a duly erected " parish for all civil purposes formed " out of the parish of Montreal, is illegal, null and void, and that such sale " could only be legally effected at the " church door of the parish of l'Enfant " Jésus.

" Such nullity can be invoked by a " hypothecary creditor by petition, with- " out a writ of summons, duly served " on all the parties interested. (Art. " 715 C. of C. P.)"

" Such nullity may also be invoked " by means of an opposition filed after " the sale and served on all the interested parties, and containing all the " essential allegations of a petition *en* " *nullité de décret.*" *Fauteux et al. & The Montreal Loan and Mortgage Co.* M. Judgment reversing, 21 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 282, 2 Leg. News 10. Confirmed 3 Sup. Court. Rep. 411.

A sheriff's sale of lands may be set aside where it appears that the whole transaction was got up for the purpose of purging the land so sold of the hypothec with which it was charged. *Bourque & Bissonnette.* M. Judgment reversing, 29 September, 1881.

The sale of real estate as belonging to an insolvent and which is the property of another, will be set aside on the suit of the real owner, who retained his civil possession of the property, although such owner has negleced to correct the error of the cadastre which set forth the property belonged to the *auteur* of the insolvent. *Shortis & Senkerhoff et al.* Q. Judgment reversing, 8 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dissenting, thought the insolvent had the appearance and was reputed to be in possession of the property, and therefore that the seizure was properly made, within the meaning of art. 632 C. C. P. (1) The judgment in the Superior Court and in appeal will be found reported, 11 R. Leg. 537.

" Where a lot of land sold at sheriff's " sale was described in the minutes of " seizure and in the advertisements as " having a two story wooden house " thereon erected, while in fact the " house in question was erected partly " on the lot sold and partly on the ad-

(1) The seizure of immoveables can only be made against the judgment debtor and he must be or be reputed to be in possession of the same *animo domini*. No seizure can be made of immoveables declared by the donor or testator thereof or by law to be exempt from seizure. Constituted rents representing seignorial dues are seized and sold with the formalities prescribed by the act 27-28 Vic., cap. 39.

"joining lot, and it was proved, more-
"over, that the purchaser would not
"have bought if he had been aware of
"the error, the sale will be vacated at
"the suit of the purchaser on the
"ground of misdescription."

"An error in the minutes of seizure
"as to the contents of an immoveable
"bearing a cadastral number will not
"alone support a demand by the pur-
"chaser to have the sale vacated on
"the ground of misdescription, even
"where a lot only 30 feet frontage was
"described as of 45 feet frontage" *La Compagnie de Prêt et Crédit Foncier & Baker et al.* M. Judgment confirming, 16 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 45, 2 Leg. News 349.

A sale of 7924 shares of the stock of a railway company by the sheriff will not be declared null, because they were sold *en bloc*; nor under the article 595 C. C. P. because they realized a sum much greater then sufficient to pay the debt, where there was no fraud, and the whole transaction was for the apparent interest of the parties concerned. There being no opposition to the sale, and the Sheriff was therefore obliged to sell according to the seizure, unles required by the defendant to alter the order of sale (595 C. C. P.) (1) ***Morris & The Passumpsic & Connecticut Rivers Railroad Company.*** M. Judgment reversing, 25 September, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ.

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(1) The sale must not proceed beyond the amount necessary to pay the debt in principal interest and costs. To this end the judgment debtor has a right to determine the order in which the effects are to be put up for sale.

O

OATH, JUDICIAL.—A number of articles were seized in execution in the house occupied by opposant and her husband. The evidence established that most of the articles belonged to the opsant, but two or three not being proved the Judge deferred the oath to her to complete the proof. *Held*, confirming the judgment of the S. C. that he was justified in so doing. *May & L'Heureux.* M. Judgment confirming, 28 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 110.

OATH, SUPPLEMENTARY.—The court may defer the supplementary oath to either of the parties, in order to complete the proof necessary for the decision of the cause, when some proof has been made of the demand of exception. (1254 C. C.)

And where it is proved that Plaintiff was to build a barn for Defendant, and to charge him for work and material furnished and also that the work was done, there is *some* proof of the demand, and therefore the judge, in his discretion, may defer the oath to the Plaintiff to complete the proof of special charges. *Hogle & Lambkin.* M. Judgment confirming, December 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

On a contestation as to indebtedness of defendant on an account composed of many items, mostly of trifling amounts, judgment was rendered for the amount admitted by defendant's plea ($225), the evidence only establishing $224.13, and costs of contestation against Plaintiff. In Review the court was of opinion that the defendant was in bad faith and deferred the supplemantary oath to the plaintiff, who established thereby an indebtedness of $228.98, for which the Court of Review gave judgment and all costs. The Court of Queen's Bench held that there was no reason disclosed to impute bad faith to defendant, who had admitted her indebtedness to within a trifling sum of all that plaintiff claimed, or could establish, with the advantage of his own oath, and that under the circumstances the supplementary oath was improperly deferred to plaintiff. *Daly & Crevier*, M. Judgment reversing, 15 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 82.

OATH, UNLAWFUL.—*v.* DAMAGES.

OBLIGATIONS arise from contracts, quasi-contracts, offences and quasi-offences, *and from the operation of the law solely*, 983 C. C. The words in italics are borrowed, not textually from Pothier. They do not appear in the Justinian compilations. There is but one text of ante-Justinian law, of unquestionable authority which deals with the division of obligations. It is to be found in the Institutes of Gains III, 88: "*Quarum (obligationes) summa divisio in duas species deducitur; omnis enim obligatio vel ex contractu nascitur vel ex delicto.*"

The report of the codification commissioners on the title of obligations has purposely avoided any discussion of the classifications.

When an obligation fixes no place of payment, a demand should be made at the domicile of the debtor before suing, and if this be not done and the Defendant pays with his plea, he will not be liable for costs. *Godrique & Grondin.* M. Judgment confirming, 5 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Rev. Leg. 643.

An action was taken on a note *en brevet* payable on demand at defen-

dant's house, without any previous demand. The defendant tendered the amount confessed judgment without interest or costs. *Held*, that, the tender was sufficient. *Dorion & Benoit.* M. Judgment reversing, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 171.

The demand of payment should be made by the creditor at the domicile of the debtor, in absence of any special stipulation. (1152 C. C.) (1) *Beaudry & Barbeau.* M. Judgment confirming, 15 February, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 268.

Where no special time for the execution of an obligation is stipulated by the contract, a reasonable time is understood. But where no time is fixed for doing a certain thing, and it is also stipulated that when that is done the party obliged to do it is to pay a certain sum of money, an action demanding absolutely the payment of the sum of money will not be maintained till the party is put *en demeure* to fulfil his obligation. *Beaudry & Les Marguilliers de l'Œuvre et Fabrique de Montréal.* M. Judgment reversing, 15 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 218.

There was a promise of sale to the effect that the price was $1200.00 of which $500.00 was acknowledged to have been received in cash at the passing of the agreement, and the balance of $700.00 was to be paid in seven equal annual instalments. The respondent was then a minor, but he was assisted, for the purpose of the agreement, by his father, who was present and who promised to procure a ratification of the agreement by his son when he should come of age. *Held* that the Respondent, not being put *en demeure*, did not forfeit his right to obtain a deed of sale by his failure to make the yearly payments agreed upon, or by his failure to ratify. *Grange & McLennan.* M. Judgment confirming, 27 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ. Sir A. A. Dorion, C. J., dis.

NOTE.—This case was appealed to the Supreme Court where it was *held:* Reversing the judgment of the Court below (Strong & Taschereau, JJ.), dissenting, that the condition precedent on which the promise of sale was made, not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to lessor and lessee. 9 S. C. Rep. 385. But see arts. 1067-8-9 C. C. *v.* REMÉRÉ.

OBLIGATION BY A CAUTION JUDICIAIRE.—A quantity of butter being seized by *saisie revendication*, the plaintiff obtained possession of it, on giving security (869 C. C. P.) (1) that he would return the butter or the value of it according to the judgment to be rendered in the case. Plaintiff abandoned the suit and Defendant sued the securities for the butter or its value. *Held* that the sureties were liable. *Poulin & Hudon & al.* M. Judgment 15 September, 1874. Dorion, C. J., Monk, Tasche-

(1) Payment must be made in the place expressly or impliedly indicated by the obligation. If no place be so indicated the payment, when it is of a certain specified thing, must be made at the place where the thing was at the time of contracting the obligation. In all other cases payment must be made at the domicile of the debtor, subject nevertheless to the rules provided under the title relating to particular contracts.

(1) The Defendant, upon a demand in revendication, may have the effects returned into his possession upon giving good and sufficient sureties that he will produce them when required, which he is in such case bound to do in the same manner as any judicial sequestrator. Nevertheless the Court or judge may, according to circumtances, grant possession of the effects to the Plaintiff, subject to the same conditions.

reau, Ramsay, Sanborn, JJ. Rep. 6 Leg. News 314.

OPPOSANT.— *Report of distribution. Notice.* — An opposant who has not been collocated by the report of distribution has no right to a special notice of the return of the report, and cannot therefore have the judgment homologating the report set aside because no such notice was given. *Prevost & al. & Lalande & al.* M. Judgment confirming, 29 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 166.

An opposition to a seizure and sale on a *venditioni exponas* will be dismissed if it be filed de plano and without a judge's order. *Delinelle & Armstrong et al.* M. Judgment confirming, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 172.

An obviously frivolous opposition filed for the purpose of delay, and which is also irregular may be dismissed on motion. *Filion & Bélanger & al.* M. Judgment confirming, 24 November, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Distribution of money. — When money is before the court for distribution, the real question is as to who is entitled to it and not the regularity of the proceedings by which it was procured.

An unpaid creditor can raise the question as to the real owner of the property sold in execution, and can claim the proceeds although the real owner be silent. *The St Ann's Mutual Building Co. & Taugher & Watson et al.* M. Judgment reversing, 28 November, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Opposition for money can only be filed within ten days after the Sheriff's return. After this they can only be filed by leave of the Court and on such conditions as the Court imposes. (720 (1) C. P. C.) In the absence of the judge the Prothonotary can accord this permission. Notice of the application must be given; where no such notice has been given the opposition will be dismissed. *Hart & Rascony.* M. Judgment reversing, 16 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dissenting.

Certain goods were seized by *saisie-arrêt simple.* The Opposants intervened as being proprietors of the things seized, but instead of contesting the rights of the seizing creditor, they gave a bond that the goods should be forthcoming to answer the judgment of the Court, and thus got the things into their possession. The Plaintiff succeeded and proceeded to execute the judgment. The sureties then opposed the execution as being owners of the things. *Held*, reversing the judgment of the Superior Court, that they were estopped from urging this title as against the seizing creditor until they had returned the things seized before the Court. *Prevost & Rodgers & al.* M. 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Monk, J., dis. Rep. 24 J. 179. 2 Leg. News 237.

OPPOSITION EN SOUS ORDRE. — A purchased a lot of land at Sheriff's sale without paying the purchase money. He subsequently exchanged it with B. who agreed to give to the Sheriff the required security to pay the mortgage. After security was given to the Sheriff, the property was irregularly sold *à la folle enchère* of A, and again resold by the Sheriff on the second purchaser. B. then claimed the proceeds of this sale as the price of his property. C, a mortgage creditor anterior to the first Sheriff's sale, claimed the amount of his

(1) Opposition for payment may be filed with the sheriff if he has not yet made his return or in the office of the Prothonotary where the return is made within six days after the return. After this delay they cannot be filed without permission of the Court or judge. [Notwithstanding the preceding provisions the proceedings under articles 645, 663, 678, 679, 680, 712, 720, 730 and 763 to 780 of this Code inclusively may be had upon any juridical day.] Q. 48 Vic., cap. 20, sec 4..

mortgage. His opposition was contested by B, and dismissed.

Held, reversing the judgment of the Superior Court, 1st, that as it did not appear that B had paid the mortgage of C, the latter had the right to be paid in preference to B the amount of his mortgage on the monies levied which represented his; 2nd, that there was sufficient evidence of the insolvency of B to sustain the opposition of C as an opposition *en sous ordre*. *Garon & Tremblay*. Q. Judgment reversing, 7 December, 1877. Monk and Ramsay, JJ., dissenting, were of opinion that there was no allegation of insolvency, and that no evidence, if there was any such, would therefore avail, and consequently that the opposition *en sous ordre* could not be maintained. Art. 753 C. C. P., (1) which is exclusive. Rep. 1 Leg. News 43.

OPPOSITION OF PARTY CLAIMING AS OWNER.—*v.* FRAUD.

Kilgour & Logan. Judgment confirming, 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. dis.

Seigniorial Constituted Rents.—The failure to produce within the six months of closing the cadastre of a seigniory the opposition required by sections 40 and 41 of the Seigniorial Act, is fatal and third parties may take advantage of it. *Panet & Boisseau et al.* Q. Judgment reversing, 8 September, 1879. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Routhier JJ. Rep. 5 Q. L. R. 377. 10 Rev. Leg. 163.

A person who claims a total exemption for taxes, and is proceeded against as a rate-payer, may make opposition under article 970 of the Municipal Code. *The Montreal Cotton Co. & The Corporation of the Town of Valleyfield.* M. Judgment reversing, 17 September, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Chagnon, JJ. Rep. 3 Leg. News 317. 9 Rev. Leg. 551.

Rights of succession. Q. Judgment reforming, 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross. JJ.

May be dismissed on motion.—*v.* MOTION.

OPTION.—Where a commission was payable in cash or bonds at the option of the debtor, part payment in cash was making an option, and gave the creditor the right to demand the balance in cash. *Bowen et al. & Gordon & al.* M. Judgment confirming, 19 January, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier. Cross, Baby, JJ. Rep. 5 Leg. News 300.

ORANGE ASSOCIATION.—The "Loyal Orange Institution" is an unlawful combination and confederacy, the members being bound by an oath to keep secret the proceedings of the Association, and therefore there was probable cause for the arrest of the Plaintiff, who was joining in an Orange demonstration likely to lead to a breach of the peace. *Grant & Beaudry*, M. Judgment confirming, 18 November, Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 393, 2 Dec. d'A. 197.

(1) Any creditor of a person who is entitled to be collocated, or is beneficially collocated, upon moneys levied, has a right to file a sub-opposition demanding that to the extent of his claim the sum accruing to his debtor be not paid to such debtor but to him. He cannot however exercise this right unless his debtor is insolvent or his claim carries execution.

P

PARTAGE.—No one can be compelled to remain in undivided ownership.

A partition may always be demanded notwithstanding any prohibition or agreement to the contrary.

It may however be agreed and ordered that the petition shall be deferred during a limited time if there be any reason of utility which justifies the delay. 689 C. C.

Partition may be demanded even though one of the coheirs enjoys separately a part of the property of the succession if there have been no act of partition nor a sufficient possession to require prescription. 690 C. C.

Minority.—Fraud. — The fact that a minor was represented at an inventory and *partage* only by her tutor (her father) who had a conflicting interest, is not a ground for setting aside the *partage* at the instance of a third party when the minor, who has since become of age, makes no complaint in respect thereof.

Where an action to set aside an inventory and *partage* is brought by a member of the family who formally consented thereto, the burden of proof is on the plaintiff to show that his or her consent was improperly obtained; and parole testimony is admissible on the part of the defendant to repel the verbal proof of fraud adduced by the plaintiff.

Persons of the age of majority are not entitled to relief from their contracts for cause of lesion only. (C. C. 1012.)

In this case no fraud was proved.

Quaere, as to there being any nuns in this Province in a position, as to their civil rights, analogous to that of civil death. *Charlebois & al. & Charlebois.* M. Judgment reversing, 28 Nov. 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 26 J. 364. 5 Leg. News 421.

PARTNERSHIP. — It is essential to the contract of partnership that it should be for the common profit of the partners each of whom must contribute to it property, credit, skill or industry. 1830 C. C.

Participation in the profits of a partnership carries with it an obligation to contribute to the losses. Any agreement by which one of the partners is excluded from participation in the profits is null. An agreement by which one partner is exempt from liability for the losses of the partnership is null only as to third persons. 1821 C. C.

If no time for the commencement of the partnership be designated it takes effect from the date of the contract. 1832 C. C.

If the term of the partnership be not designated it is considered to be for the life of the partner subject to the provisions contained in the fifth chapter of this title. 1833 C. C.

A note made fraudulently by a partner in the partnership's name, binds the partnership in the hands of a *bona fide* holder for value. *Walter & The Molsons Bank.* M. Judgment confirming, 18 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

The individual note of a partner of an insolvent firm, himself insolvent and which has been entered in his statement of liabilities, cannot be recovered

upon. And the fact that the note in suit is slightly different from the note mentioned in the statement may be explained by evidence. *The Exchange Bank of Canada & Eward.* M. Judgment confirming, 25 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Liability of Partner.—Although the Appellant had, in error, subscribed for a larger number of shares than he intended. in the capital stock of the company Respondent, and had sought ineffectually to be relieved immediately after, yet the fact that he allowed nearly two years to pass before taking legal action to have the contract annulled, and only took such action when calls were made to cover losses, and had in the meantime accepted a dividend of ten per cent. on his shares, constituted an acquiescence sufficient to render him liable for the whole amount subscribed.

Where the law declares *consent* to be of the essence of a contract, it does not refer to the consent of the mind, but to the declaration of consent. *Coté & Stadacona Insurance Co.* Q. Judgment confirming, 8 March, 1880. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Monk, Tessier, JJ. dis. Rep. 6 Q. L. R. 147, 10 Rev. Leg. 289.

Reversed in Supreme Court, where it was *held:* (Sir W. J. Ritchie, C. J., dubitante) reversing the judgment of the Court below that the evidence shewed the Appellant never entered into a contract to take 50 shares, that the receipt given for a dividend of ten per cent on the amount actually paid (*montant versé*), was not an admission of his liability for the larger amount, and he therefore was not estopped from showing that he was never in fact holder of fifty shares in the capital stock of the company. 6 Sup. Ct. Rep. 193.

The parties while in partnership acquired 160 shares of certain mining rights which, according to their copartnership deed, were to be divided between them in the proportion of three-fourths for the Appellant and one-fourth for the Respondent. These mining rights were in the individual name of the Appellant who, during the copartnership, sold eighty of these shares for $9,000, and subsequently he transferred on his account to Miss Auldjo. These last eighty shares were subsequently claimed and recovered by a third party.

The transfer made to the Respondent of the forty shares to which he was entitled in his partnership property must be considered as, and have the effect of, property held in common, and that the Respondent was only entitled to recover from the Appellant, the value which these shares had at the time of this transfer, made in *lieu* of a partagé, and not the value which they had when the Respondent was dispossessed of them.

Art. 1507 C. C. (1) does not apply to partition between co-partners. Where two partners made a partition of shares forming a portion of the partnership property, and one was evicted from his share, the other partner was held not liable for more than the value of the share at the time of the partition, *i. e.,* his obligation was merely to equalize the value of the portions, without a new partition. *Prentice & MacDougal.* M. Judgment reversing, 23 January, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ. Rep. 7. Leg. News 163, 4 Dec. d'A. 91.

A part owner of a mine agreed to its sale for £88,000 sterling. Another part owner only agreed to its sale in consideration of his share being taken at a valuation of £92,000 sterling. The vendor at the lower price has no claim to have a share of the difference obtained by the vendor of the higher price. *Livesey & Allan.* M. Judgment confirming, 9 1878. Monk, Ramsay, Tessier, Cross, Sicotte. JJ.

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(1) Legal warranty is implied by law in the contract of sale without stipulation. Nevertheless the parties may, by special agreement, add to the obligations of legal warranty or diminish its effect, or exclude it altogether.

A party who has an action to account pending between him and his late partner may have a special action with regard to matters not being part of the partnership's affairs and not depending upon them. *Gauthier & Roy.* Q. Judgment confirming, 4 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 443.

When a partner sues his co-partner to account, it is not necessary for him to allege that he has accounted, or that he has nothing to account for, it is sufficient for him to allege that the Defendant owes him an account, and in default of the Defendant rendering account within the delay fixed by the judgment ordering an account, then Plaintiff was proceed under the art. 533 (1) C.C.P. *Gauthier & Roy.* M. Judgment confirming, 7 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. de la C. d'A. 149.

There was a joint adventure for the purchase of certain real estate in the name of Appellant. The partners were, on certain conditions, each to have a share. It appears they left Appellant to bear the amount of the acquisition, and he afterwards sold the property for his own profit. Respondent sued for his share of the price of sale. The Appellant tendered an account of his transaction. The action should have been to account, but the Appellant having tendered an account covered the irregularity. *Brewster & Lamb.* Judgment confirming, 22 Dec., 1879, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The Appellant brought suit against the Respondent, alleging a purchase by them jointly of certain promisory notes and securities which the Respondent collected for their common profit, the Appellant's share, acknowledged by the Respondent, being $713.75; the Appellant added the common assumpsit counts, and prayed for an account in the usual form with vouchers, and that, in default, the Respondent should be condemned to pay the said sum of $713.75. *Held*, on demurrer that the demand for an account was not warranted by the allegation of the declaration, and was not the proper remedy for the cause of complaint therein stated.

Semble.—A party suing another to account in a partnership matter, is not obliged to tender an account or to declare that he has none to give. *Michaud & Vézina.* Judgment confirming, 7 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 6 Q. L. R. 353.

Lorsqu'un associé poursuit un autre associé en reddition de compte, il n'est pas obligé d'alléguer qu'il a lui-même rendu compte, ou qu'il n'en a pas à rendre, il lui suffit d'alléguer que le défendeur a en sa possession des biens ou sommes de deniers appartenant à la société qui a existé entre eux, dont il n'a pas rendu compte.

A woman, *commune en biens* with her late husband, and *légataire universelle en usufruits* may bring an action against the partner of her late husband for an account of the partnership, without calling in the *nu-propriétaires. Gingras & Dignan.* Q. Judgment confirming, 5 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The parties and one Angus MacDonald tendered for the construction of the graving dock at Quebec, which included the dredging, masonry and other works. On a second tender the works were awarded to Peters, and the Respondents obtained a contract for the dredging through Peters, but directly from the Government.

Held:—Reversing the judgment of the Superior Court: That although there were no articles of partnership signed between the parties, from their correspondence it appeared that all were to have a share in any contract they might obtain, either for the whole work, or for any portion of it, and more

(1) If the Defendant fails to render an account, the Plaintiff may proceed to have one made out in the manner mentioned in the art. 523.

specially for the dredging, whether such contract was obtained directly from the Government or as a sub-contract; and that Appellant was entitled to claim damages from the Respondents for their refusal to acknowledge him as a partner in the contract for the dredging. *Kane & Wright et al.* Q. Judgment delivered in M. 21 Dec. 1880, reversing. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 297, 4 Leg. News 15.

Failure to register declaration. — Where the declaration (in an action for a penalty for non-registration of partnership) alleged in a first count that Defendant for more than sixty days before the institution of the action had carried on business in partnership with "A. B and C." under the firm of "C. A. and Sons" *for the purpose of trading and manufacturing;* and in a second count that Defendant (for more than sixty days, &c.) had carried on business in partnership with "other persons" under the firm of "C. A. and Sons" for trading purposes; and then proceeded to allege that no declaration of "said partnership" had been registered as required by-law: that the two counts referred with sufficient distinctness to the same partnership, and moreover, the objection, if in any way valid, should have been specially raised by a preliminary plea, and not on the merits. *Mr. William & Findlay.* M. Judgment confirming, 20 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Rep. 23 J. 245.

Evidence of. — *Lamoureux & McCaffrey.* Q. Judgment reversing, 3 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Michel Auger and J. B. Auger formed a partnership and registered it under the social name of "Auger & Co." Later Michel Auger and one Derby formed a partnership under the social name of "Auger & Co." Michel Auger bought goods of Gilmour & Co. and gave the note of "Auger & Co." Gilmour & Co. had no notice of the dissolution of the old firm of Auger & Co. *Held*, reversing the judgment of the Superior Court, that credit was presumed to be given "to the last firm, the only one doing business. *Auger et al, & Gilmour et al.* M. Judgment reversing, 16 June, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay, J., dissented. He thought J. B. Auger had renders himself liable by not having given notice of the dissolution of the former partnership, which might have been continued tacitly beyond the year. He should not have allowed the registration to stand.

J. C Guay gave his promissory note to a party in the following form:

"Trois-Rivières, 4 Juin 1867.

"Trois mois de cette date, nous pro-
"mettons payer solidairement l'un
"pour l'autre, à Alf. E. Hart, écr., ou à
"son ordre, la somme de mille soixante-
"quatre piastres, au Bureau de l'A-
"gence de Québec, à Trois-Rivières,
"pour valeur reçue.

"J. C. GUAY."

It was contended by the Plaintiff that this note was given for the purposes of a partnership existing between Guay and his mother, and that she had agreed to sign the note, and the action was against both. Judgment in the S. C. went against J. C. Guay, but the action against the mother was dismisse d. *Held*, maintaining the judgment appealed from, that verbal evidence was not admissible even in a commercial matter to make the mother liable on this transaction. (1235, 3 C. C.) (1) *Hart & Dme Marineau.* Q. Judgment confirming, 5 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A person who has a share of one third in the transactions of a partnership, although not registered as a partner, is a partner, and will be subject to compulsory liquidation as such on the insolv-

(1) Upon any representation or assurance in favor of a person to enable him to obtain credit, money or goods thereupon.

ency of the partnership. *Knight & Ross.* Q. Judgment confirming, 8 March, 1876. Rep. 10 Rev. Leg. 208.

One of two co-partners died, the survivor continued in liquidation and finally assigned under the insolvency act. A creditor of the survivor attached the goods of the partnership, under the pretext that by a covenant of the deed of partnership the survivor might under certain conditions, take the stock. A creditor of the firm opposed the seizure. *Held*, that after insolvency the surviving creditor could not take the stock to the detriment of the creditors, and that his creditor therefore could not exercise the right under the articles of partnership. *Slater & Whitney et al.* M. Judgment confirming, 21 May, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Private estates of insolvent partnership. — The Consolidated Bank of Canada proved a claim for $153,464.62 against the insolvent estate of Mulholland & Baker, secured by the individual liability of Henry Mulholland & Joel C. Baker, two of the members of the firm, under a letter of guarantee of the 20th of January, 1876. this security valued in the claim at $75,000, and also by a transfer from M. & R. of two mortgages on the property of William P. Bartley for $25,000 each and valued at $45,000.

The Merchant's Bank proved its claim secured by a transfer of another mortgage on William P. Bartley's property for $25,000 and which the Bank valued at $13,000. On the claim made by the Consolidated Bank, Leslie, a creditor of Mulholland & Baker, contested the transfer made by M. & B. to the bank of the two mortgages against Bartley's property, and asked that this transfer be set aside as having been made in fraud of the creditors. On the claim of the Merchants' Bank, Leslie, on the same grounds, contested the transfer made to the Bank by M. & B. of their other mortgage on Wm. P. Bartley s property. Rodgers and others, also creditors of M. & B., contested the claim made by the Consolidated Bank, and the validity and effect of the letter of guarantee given by Henry Mulholland & Joel C. Baker on their private estates, as being in fraud of the creditors of the firm.

Held :—That as the contestations could not affect the claims of the Consolidated Bank and of the Merchants' Bank against the estate of M. & B., the contestants had shown no interest in their contestations, and that the creditors could only challenge the validity of the security held by the Banks by a direct action in the Superior Court, or by contesting the claims which might be made upon such security on the individual estates of Henry Mulholland and of Joel C. Baker, or of Wm. P. Bartley, respectively. *The Consolidated Bank of Canada & Leslie, The Merchants' Bank & Leslie & Rogers et al., & The Consolidated Bank of Canada.* M. Judgment, 25 Jan., 1881, confirming the first and second cases, and reversing the third. Sir A A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 198.

Individual debt of partner. Interest. —The creditor of a hypothecary debt bearing interest due by one of the partners, is entitled to be paid interest in full up to date of collocation out of the private estate of the partner, before the creditors of the firm are entitled to rank against the private estate. *The Consolidated Bank of Canada & Moat.* M. Judgment confirming, 31 October, 1883. Rep. 6 Leg. News 358. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ. The cases of the *Consolidated Bank & Workman et al., & The Consolidated Bank & The Merchants Bank* involved the same question and were confirmed. In the cross appeal of the Moat case the judgment was reformed, on a mere question of fact, whether the calculation included compound interest.

The interest to entitle a party to intervene in a suit must be actual. So where there was a demand calling on K. to assign owing to his having allowed his commercial paper to go to protest, and an action against K. & C. Bros. between whom it was alleged a part-

nership existed, C. Brothers will not be allowed to entervene. *Cook et al. & The Bank of Montreal.* Judgment confirming, March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

PARTY INSOLVENT—*Only to authorize wife. Security for costs.*—*v.* INSOLVENCY.

PATENT OF INVENTION.—What is subject of new patent. *Miller et al. & The Canada Tanning Extract Co.* M. Judgment confirming, 13 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Taschereau, JJ., Ramsay, Tessier, JJ., dis.

A patent of invention was granted to M., who acknowledged the scientific assistance he had received from Dr. Sterry Hunt in making the invention, and for which he bound himself to Dr. Hunt in the following terms: "And in consideration of the scientific aid and counsel thus given and afforded by the said Thomas Sterry Hunt, to the said George Matthews, the latter has bound himself to pay to the said Thomas Sterry Hunt, during the whole term of the duration of the said patent, to wit: fourteen years from the first day of the present month of April, the one-fourth part of the net profits arising and made, or hereafter to arise and be realized *during said period, or during any period for which said patent may be continued or prolonged, as provided by law*, out of the said discovery, and the use and application thereof in virtue of the said patent, during the term thereof aforesaid." M then assigned his patent to B and L. One of the conditions of the patent was: "That the said Burland & Lafricain shall have the right and privilege to petition for a renewal of the Letters' Patent for the said Lint, at their own cost and charge, and for their own benefit, using the name of the said George Matthews, or representatives for that purpose." B & L obtained an extension of the patent and the widow of Matthews sued for the Royalty during a portion of such continuation. Dr. Hunt also intervened. The principal action was dismissed on the ground that by the deed from Matthews to B & L, the latter were allowed to renew the Letters Patent at their own costs and charges, and for their own benefit," and that therefore she had no interest in the patent after the termination of the first fourteen years. The intervention of Dr. Hunt was dismissed on the ground that he was thereby only urging the claims of M. and that as they were unfounded his intervention must fail; and that his personal claims under the deed from M, which were against the Matthews estates. *Hudson & Burland et al. & Hunt.* M. Judgment, September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. On the former judgment Monk, J., dis. On the latter judgment, Monk & Sanborn, JJ., dis.

The measure of damages for infringement of a patent of invention, by using the patent purchased of a manufacturer of the invention, and not the inventor, is not the profit the purchaser derived from the use of the patent. *Pinkerton et al. & Côté.* M. Judgment reversing, 30 June, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

An invention to be the proper subject of a patent, must have some novelty about it and not be merely the unimportant application of known principles to known materials, to bring about a known result. So where a carriage builder added an additional fold to an ordinary carriage hood, it was held not to be the subject of a patent. *Bellemare & Dansereau.* M. Judgment reversing. 30 June, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A patent of invention of machinery may be infringed by the use of a machine dissimilar in appearance, if the principle patented be interfered with.

The damages for infringement of a patent by the use of a machine cannot be measured by the profit made by the party, so infringing the patent. The true measure is the loss suffered by the patentee. *Pinkerton et al. & Côté.* M. Judgment reversing, 30 June, 1886.

Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

PATERNITE.—An action *en déclaration de*, and aliments for the child may be joined to an action of damages for seduction by the mother. *Kingsborough & Pound.* Q. Judgment confirming, 5 March, 1878. Rep. 4 Q. L. R. 11. 1 Leg. News 115.

PAWNBROKER, A—Is defined by the 34 Vic., c. 2, section 7, (Q), to be within the meaning of the act, "any person who receives or takes, by way of pawn, pledge or exchange, any goods for the repayment of money lent thereon, otherwise than in the ordinary of banking, or the usual course of commercial dealings between merchants or traders." *Moss & Silverman.* M. Judgment confirming, 15 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Rev. Leg. 675.

PAYMENT.—By payment is meant not only the delivery of a sum of money in satisfaction of an obligation, but the performance of anything to which the parties are respectively obliged. 1139 C. C.

Every payment presupposes a debt; what has been paid where there is no debt may be recovered. There can be no recovery of what has been paid in discharge of a natural obligation. 1140 C. C.

Payment to be valid must be made by one having a legal right in the thing paid, which entitles him to give it in payment.

Nevertheless if a sum of money or other thing of a nature to be consumed by use be given in payment it cannot be reclaimed from the creditor who has consumed it in good faith, although the payment have been made by one who was not the owner nor capable of alienating it. 1143 C. C.

Payment must be made to the creditor or to some one having his authority or authorized by a Court of Justice or by law to receive it for him. Payment made to a person who has no authority to receive it is void if the creditor have ratified the payment or profited by it. 1144 C. C.

Payment made in good faith to the ostensible creditor is valid although it be afterward established that he is not the rightful creditor. 1145 C. C.

The appellant Lambert, accompanied by one Daignault (nephew of appellant it appears) sold to Wm. Dow & Co., the respondents, two car-loads of barley to be delivered in respondents' yard. The first portion of this grain was delivered by Daignault to whom it was consigned, and paid for by cheque made payable to appellant's order. This sum reached appellant safely, and he wrote to respondents requesting them to pay by cheque, but without telling them to make the cheque payable to appellants' order or not to give it to Daignault. The second portion of the grain was also delivered by Daignault, and respondents paid by cheque, which they gave to Daignault. It seems Daignault kept the money for his own use and appellant contends that the payment to Daignault was not a payment to him. The court held, that the payment to the consignee, bearer of the goods, was a valid payment; and that in any case the appellant by his conduct in not objecting to the payment to Daignault confirmed the respondents in the belief that Daignault was authorized to receive the price of the grain. *Lambert & Scott et al.* M. Judgment confirming, 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Where a carrier is charged by the owner with the delivery of goods, and holds a document of title, and the goods are payable on delivery, payment to the carrier without fraud, and without notice to the purchaser not to pay the carrier, discharges the purchaser. *Lambert & Scott et al.* M. Judgment confirming, 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Of contractors.—By contract between a builder and the syndics for building a church, the latter agreed to pay the

former the balance owing to him before it was due, for a discount of 10 *per centum*. On this agreement the builder received $3411.63 and gave the syndics a discharge. On reflection he found that the calculation was based on a false principle, and that by the mode of dealing with the figures he had been made to pay for some of the instalments instead of getting anything from them. *Held*, that the interpretation given to the contract, and which was not contradicted by its terms, could not be disturbed. *Allard & The Syndics of the Parish of St. Bridget*. M. Judgment confirming, 27 Nov., 1883. Sir A. A. Dorion. C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay and Tessier, JJ., dis.

When there is a stipulation that a contractor shall only be paid on the certificate of the employer's engineer, it is not an answer to the action of the contractor to plead that the certificate has not been furnished.

To take advantage in any way of such stipulation, it should be specially pleaded.

The stipulation that an employer may "for ever retain the reserved percentage on account of the consideration for damages which may have been sustained by reason of the forfeiture of this contract." cannot be interpreted to mean that he has a right to retain the 15 *per centum*. if there be no damages or any part of it not compensated by damages.

An employer is not justified in taking the works out of the hands of a contractor owing to his not having fulfilled his contract within the time specified, if the failure to carry out the contract be due to the fault of the employer, and if he does so it is at his own risk. *McGreevy & Marchand*. Q. Judgment confirming, 8 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 11 Rev. Leg. 157.

Delegation.—Is perfect or imperfect, 1173 C. C. (1) Indication of payment, 1174 C. C. (2) A perfect delegation operates novation. 1172, 1175 C. C.

A simple indication of payment or the delegation of a new debtor, creates no *lien de droit* between him and the indicated creditor, so long as the latter has not accepted the party delegated.

The acceptance need not be express, except as regards third parties, but may be inferred from circumstances.

Registration by the parties is not equivalent to an acceptance of the delegation. *La Société Permanente de Construction Jacques-Cartier & Robinson*. M. Judgment confirming, 19 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Cross, Baby, JJ. Rep. 1 Dec. d'Ap. 32. 4 Leg. News 38.

Delegation until it is accepted does not bind the parties delegants, it only operates as an *indication de payment*. *Reeves & Darling*. M. Judgment confirming, 19 Nov., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Imputation of.—A debtor of several debts has the right of declaring when he pays, what debt he means to discharge. 1158 C. C.

This is called Imputation of Payment.

When the receipt make no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying. If of several debts one alone be actually payable, the payment must be imputed

(1) The delegation by which a debtor gives to his creditor a new debtor who obliges himself towards the creditor, does not affect novation unless it is evident that the creditor intends to discharge the debtor who makes the delegation.

(2) The simple indication by the debtor of a person who is to pay in his place, or the simple indication by the creditor of a person who is to receive in his place, or the transfer of a debt with or without the acceptance of the debtor does not affect novation.

in discharge of such debt, although it be less burdensome than those not actually payable. If the debts be of like nature and equally burdensome the imputation is made upon the oldest. All things being equal it is made proportionally on each. 1161 C. C.

A broker sold for account of Respondents 13,000 bushels wheat, and acknowledged to have received $8,000 on account of price and promised to pay it. The broker could not afterwards apply the money so paid by the purchaser towards the settlement of a proportionate rate on all sales made to him by the purchaser, but is personally liable to the vendor for the whole $8,000. *Kershaw & Fitzpatrick et al.* M. Judgment confirming, Sept., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Confirmed in Privy Council.

The Appellant assignee to the insolvent estate of the Morris Run Coal Company filed a claim on the insolvent estate of the Moisic Iron Company for a balance of $330,214.79.

The Respondents contested this claim, alleging that $36,129.18 was not due by the Moisic Iron Company, but by a former Company; that if the balance had been advanced, it should be imputed in payment of $250,000 of stock transferred as paid up stock by Wm M. Molson to other parties, but in reality for the Morris Run Coal Company, and which was never paid.

Held, that out of the sums claimed, that of $36,129.18 was due by the Moisic Company, and not by the Moisic Iron Company.

That the Morris Run Coal Company owned $200,000 of the stock of the Moisic Iron Company which had never been paid for, and that the balance of their claim must be imputed in payment of their stock. *Lynch & Henshaw et al.* M. Judgment confirming, 27 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 242.

Indication of.—Registration of deed containing indication of payment to creditor of vendor. *v.* REGISTRATION.

Preferential.— A sum of money paid within thirty days before a demand of assignment, by a debtor unable to pay his debts, to a person knowing such insolvency, or having means to know it, is void, and and on suit of assignee may be recovered back. (1) *McArthur & Mulholland.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J. Rep. 2 Leg. News 211.

A sale of moveables, (not in the ordinary way of business), by a trader, when actually insolvent, though he did not become an insolvent under the act until two months afterwards, to a creditor who knew or had reason to know of his insolvency, the price being credited by the purchaser to his debtor, is fraudulent and null and void, though the creditor may have allowed the full value of such articles on account of his claim. *Kane & Racine.* M. Judgment 3 Feb., 1880. Sir A. A. Dorion, C. J. Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis. Rep. 24 J. 216. 3 Leg. News 66.

The Defendant's were creditors of Hagens & Co., on two notes given for glue sold on or about the 1st and 10th April, and amounting to $97!.46 which notes were discounted by the Defend-

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(1) A contract cannot be avoided unless it is made by the debtor with intent to fraud and will have the effect of injuring the creditor.

An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud. 1035 C. C.

No contract or payment can be avoided by reason of anything contained in this section at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof. If the suit be by assignees or other representatives of the creditors collectively, it must be brought within a year from the time of their appointement. 1040 C. C.

Fraud is a cause of nullity when the artifices practised by one party or with his knowledge are such that the other party would not have contracted without them. It is never presumed and must be proved. 994 C. C.

ant's about the 19th May. The insolvents gave in payment of the notes $1,055.42 worth of glue, and Defendant's paid the notes and returned them to the insolvents. *Held*, that although the transaction was one not usually occurring in business it is not conclusive that it was a preference, granted by the insolvents in view of insolvency, and that the Defendant's knew that H. & Co, were insolvent at the time. *Whyte & McArthur et al.*. Judgment confirming, 21 Dec., 1476. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

D. & W., were endorser's of H. D's paper for credit, particularly with a view of allowing H. D. to built a ship H. D. failed and his estate made mortgage of ship ever to D. & W. The latter, desiring extension of time for the payment of the endorsements applied to the bank for this accommodation, and offered as security the mortgage which was transferred to the bank. D. & W., afterwards stopped payment and owing to these transactions. *Held*, reversing the judgment of the Superior Court, 4 June, 1880, that this was not a fraudulent preference as D. & W., were not notoriously insolvent at the time of the transfer, and as the transaction with the bank was a notice of their insolvency to the bank. *La Banque Stadacona & Walker*. Q. Judgment, 4 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 381.

L'Appelant, syndic à la faillite de Thomas Beaudoin, a vendu à F. P. Lemieux, son père, a payé le prix de vente, partie en argent et partie au moyen d'un billet du failli.

Jugé:—Infirmant le jugement de la Cour Supérieure, que la vente du fonds de commerce était une cause valable pour le billet en question et, qu'à tout événement, l'Intimée, qui représente son mari décédé, ne pourrait se refuser de payer le billet qu'en rapportant le fonds de commerce pour lequel il a été donné. *Lemieux & Bourassa*. Q. Judgment reversing, 3 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 305.

Brown & McInnis. M. Judgment, 18 Dec., 1876. *v. Boyer & Dufencault*. M. Judgment, 18 Dec., 1876. Both cases were confirmed, Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. The Chief Justice took no part in the *délibéré*, and was absent when the judgment was pronounced.

Where monies have been deposited from time to time in a Bank to the credit of A., of whom the bank was creditor to an amount far exceeding the balance of such deposits, and on the understanding that such deposits were to ensure to the benefit of the creditors of A. generally, B. and others cannot legally sue the Bank to recover a proportion of such deposits, on the ground that a portion of said monies really belonged to B. and others, in the absence of any notice to, or knowledge by the bank of the existence of any such right on the part of B. and others, whilst such deposits were being made. *La Banque Jacques Cartier & Giraldi et al.*, M. Judgment reversing, 21 March, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 26 J. 110.

Where an action is brought by one creditor to recover back from another creditor what the latter has recovered by diligence from the insolvent, without fraud, the creditor bringing such action is only entitled to recover rateably from the other creditor. *La Banque Jacques-Cartier & Beausoleil*. M. Judgment reversing, 25 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 151, 4 Leg. News 116.

An insolvent may obtain delay from his creditors on condition of his giving security for one fourth of his debts, and he may without the concurrence of his creditors, agree with the surety that he will abstract from his estate a certain sum weekly to be placed at the credit of the surety, and to be used by him as a guarantee against loss. *Normand & Beausoleil*. M. Judgment reversing, 28 April, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk and Ramsay, JJ. dis. Rep. 2 Dec. d'A. 215.

Demand of. — When an obligation fixes no place of payment, a demand should be made at the domicile of the debtor before suing, and if this be not done and the Defendant pays with his plea, he will not be liable for costs. *Godrique & Grondin.* M. Judgment confirming, 5 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Rev. Leg. 643.

An action was taken on a note *en brevet* payable on demand at Defendant's house, without any previous demand. The Defendant tendered the amount and confessed judgment without interest or costs. *Held*, that the tender was sufficient. *Dorion & Benoit.* M. Judgment reversing, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 171.

The demand of payment should be made by the creditor at the domicile of the debtor, in absence of any special stipulation. (1152 C. C.) (1) *Beaudry & Barbeau.* M. Judgment confirming, 15 February, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 268.

Demeure.—Where no special time for the execution of an obligation is stiputed by the contract, a resonable time is understood. But where no time is fixed for doing a certain thing and it is also stipulated that when that is done the party obliged to do it is to pay a certain sum of money, an action demanding absolutely the payment of the sum of money, will not be maintained till the party is put *en demeure* to fulfil his obligation. *Beausoleil & Les Marguillers de l'Œuvre et Fabrique de Montréal.* M. Judgment reversing, 15 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 218.

PENAL ACTIONS.—In penal actions, such as those instituted under sections 134 of the electoral act of Quebec (38 Vict. c. 7) the evidence must be considered under the strictest rules, on the principale *que la fraude ne se présume pas. Neault & St. Cyr.* Q. Judgment confirming, 5 June, 1877. Sir A. A. Dorion. C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 3 Q. L. R. 147.

PENAL CLAUSE.—A clause by which a party obliged himself by a lease for seven years within 12 months of the date of the lease, to build a house *logeable* and *habitable* of at least 18 feet by 20, and that in default of his so doing that the lessor should have the right to demand the resiliation of the lease, is penal, and the lessee having fulfilled the condition of the lease before the institution of the action to set the lease aside, although after the time stipulated, the right of action of the lessor had ceased before the institution of the action. *Cauchon & Anderson.* Q. Judgment reversing, 4 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

PENALTY.— *Winter road.*—A municipality is responsible for damages arising within its limits for neglecting to conform to article 835 M. C. which, as amended, requires that a single track road must not be less than seven feet in width, between the two rows of balizes. *Corporation de St. Christophe & Beaudette.* Q. Judgment confirming. 6 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R. 316, 10 Rev. Leg. 591.

No action will lie for the penalty stipulated in a bond of arbitration, where the award has been complied with, even after the time stipulated, unless it appears that the penalty was stipulated as an indemnity for the delay to fulfil the obligation,—and this will not be presumed in the absence of precise words, if the amount of the penalty is out of all proportion to the matter in dispute. *Lépine & Fiset.* Q. Judgment

(1) Payment must be made in the place expressly or impliedly indicated by the obligation. If no place be so indicated, the payment when it is of a certain specific thing must be made at the place where the thing was at the time of contracting the obligation. In all other cases, payment must be made at the domicile of the debtor, subject nevertheless to the rules provided under the title relating to particular contracts.

confirming, 8 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 153.

PENALTY FOR SITTING AS MEMBER OF THE LEGISLATIVE ASSEMBLY AND VOTING ON BAD QUALIFICATION.—This being a penal action it is subject to the strictest rules of law. Fraud is not to be presumed. *Neault & St. Cyr.* Q. Judgment confirming, 5 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. R. 3 Q. L. R., p. 147.

PENALTY FOR VOTING AT LOCAL ELECTION.—The prohibition enacted by cap. 6 C. S. of C., to prevent any "officer of customs" to vote at any election of a member of the legislative assembly of the then Province of Canada, under a penalty of $2.000), does not by the reason of the law, apply to a federal officer voting at a local election; and the transitory provision contained in section 84 B. N. A. Act, is only intended to apply the existing Statutes so far as may be necessary for the working of the constitution accorded by such act. *Hamilton & Beauchesne.* Q. Judgment confirming, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a disposition of statutory law has been incorporated in the Code without a penalty included in the Statute, the section of the Statute is repealed; and so where the provisions of chapter 37 of the C. S. L. C., sections 74, 75 and 76, relating to the deposit by Registrars of the Official Plans and Books of Reference for each Registration division, have been abrogated, in virtue of article 2613 of the Civil Code, and by the express provisions on the same subject contained in articles 2168, 2169, 2170 and 2171 of the same Code. *Montizambert & Dumontier.* Q. Judgment reversing, 6 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Sanborn, Tessier, JJ.. dis. Rep. 4 Q. L. R. 234.

PENSION ALIMENTAIRE. — *v.* ALIMENTS.—ARREARS.

Lorsqu'un employé du service civil de la province de Québec, a été mis à la retraite et que le montant de sa pension a été établi par un ordre du Lieutenant-Gouverneur en conseil, le montant de sa pension ne pourra ensuite être réduit, parceque l'employé n'aura pas servi le temps nécessaire pour lui donner droit à la pension accordée par l'ordre-en conseil, s'il appert que lors de la fixation de la pension, le Lieutenant-Gouverneur en conseil connaissait tous les faits relatifs au service de cet employé. *La Reine & Fortier.* Q. Judgment confirming, 7 December, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11 Q. L. R. 357, 14 Rev. Leg. 160.

PERILS OF THE SEA. — Where the master of a ship contends that the destruction of cargo was due to the perils of the sea he must prove it, or he will be held liable in damages for the loss. *Hearle & James et al.* M. Judgment reversing, December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

PERJURY.—*New trial.*—Where, on a reserved case, the Court of Queen's Bench holds the conviction to be bad, and the question has been reserved whether a new trial should be granted, a new trial may be ordered in cases of misdemeanor, under C. S. L. C., cap. 77, s. 58, ss. 2;—the authority given to the Court of Queen's Bench "to make such other order as justice requires," including the right to order a new trial where, in the opinion of the Court, the interest of justice require it.

A general verdict on two counts for perjury was bad, where the assignment of perjury in the second count was defective, in setting up part only of what the defendant said and omitting a qualifying statement, and the evidence on the first count was so contradictory as to leave room for doubt whether the jury would have found a verdict of guilty on that count if it had stood alone. And this was so held, notwithstanding that if the first count had stood alone the verdict could not have been touched. *Reg. & Bain.* M. Judg-

ment ordering new trial, 22 June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier JJ. Sanborn J. dis. Rep. 23 J. 327.

Evidence.—The prisoner was indicted for perjury in a deposition in a civil suit. He was sworn before the judge, who took notes of the evidence, on the 25 April, 1873. The case was then continued to the first *enquête* day, but not proceeded with, till the 25 April, 1874, a day in term, when the deposition was continued *at length*, and owned and acknowledged before the prothonotary. The alleged perjury was in the last part of the deposition. The objection taken was, that this was only a voluntary statement. The objection was held to be well taken, and the conviction was quashed. *The Queen v. Gibson.* M. Judgment quashing conviction, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 7 Rev. Leg. 573.

Where the *enquête* is taken under art. 284 C. C. P., (1) there must be a consent in writing to render the proceeding regular, and a deposition taken when there is no such consent is only a voluntary statement on which perjury cannot be assigned. *The Queen v. Martin*, M. Judgment, 19 May, 1876. Q. B. Cr. side, Ramsay, J. Rep. 21 J. 156, 7 Rev. Leg. 672.

The non production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the Defendant is alleged to have given false testimony, is not material. where the assignment of perjury has no reference to the pleadings; but the Defendant, if he wishes, may in case the plea be not produced, prove its contents by secondary evidence.

It is not essential to prove that the facts sworn to by the Defendant, as alleged in the indictment, were material to the issue in the cause in which the Defendant was examined.

A reserved case may be amended at the request of the Defendant, during the argument thereon before the full Court, by adding the evidence taken at the trial.

(Following *Reg. & Bain*, 23 L. C. J. 327). A new trial may be ordered on a reserved case, in misdemeanours, where it appears to the Court on the evidence that an injustice may have been done to the Defendant. *The Queen & John Ross.* M. Judgment reversing, 27 Sep., 1884. Sir A. A. Dorion, C. J., Monk. Ramsay, Cross, Baby, JJ. Reported M. M. L. R. I. Q. B. 227.

It is not justification for accusing another of perjury, that he swore in an affidavit in support of a petition *en destitution de tutelle* that the *assemblée de parents* took place at the house of one Major instead of at the office of the notary, where it really took place, and that the meeting was secret and the nomination of the tutor fraudulent. unless it appears that there was wilful intention to mislead, &c., such intention will not be presumed if there be sufficient circumstances surrounding the nomination of the tutor to justify suspicion of fraud although fraud may not have been established. *Major et al. & Lalonde.* M. Judgment confirming. 2 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Petition to set aside assignment in insolvency.—*v.* INSOLVENCY.

PETITION TO REVISE.—Errors in the printed factum of an appeal will not justify a *requête civile. Hampson &*

(1) Upon the consent in writing of all the parties to a case and subject to such additional costs and fees as may from time to time be fixed by tariff, the proof may be taken down in writing in the manner hereinafter provided, either before a judge or before the prothonotary, who in such case may exercise all the powers of a judge, except as to the objections which must be reserved for the decision of the latter. If the judge is unable to attend Court on the day fixed for taking proofs, the prothonotary may preside over them, and in such case he exercises all the powers of a judge, except as regards the objections made by either party which must be taken down in writing and reserved for the decision of the Court at the final hearing of the case.

Thomson. M. Judgment, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 206.

PETITORY ACTION.—An hypothecary creditor, who has taken possession of property held by his debtor, cannot claim the property as his own to defeat the petitory action of the real owner of the property, and the hypothecary creditor, has no interest in such petitory action. *Lionais & Cuvillier et al.* M. Judgment confirming, 21 December, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

An ordinary petitory action will not lie against an assignee in insolvency for the recovery of real estate in his possession as such assignee. *Fair & Désilets.* M. Judgment reversing, 26 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J., dissenting. Rep. 4 Leg. News 84. 1 Dec., d'A. 212.

Plaintiffs brought a petitory action, instead of an action *en dommage.* The Defendants pleaded prescription and took no exception to the form of the action. The Court below dismissed the plea of prescription as being unsupported by the evidence, and "seeing "the boundaries between the property "of the Plaintiffs and the property of "the Defendants have not been legally "settled, and are uncertain, and that "it is necessary to settle the bonndaries "before adjudicating upon the demand "of the Plaintiffs, and considering that "the said boundaries ought to be "settled so as to be in accordance with, "and to give effect to the deed styled "'Transaction between John Caldwell "& Joachim Demers and others,' dated "8th Oct., 1806," ordered, that a boundary line in accordance with the said deed be drawn by a surveyor, and by final judgment condemned the Defendants to deliver up 67½ square perches shown by the surveyor's plan to belong to the Plaintiffs. *Atkinson et al. & Hall et al.* M. Judgment confirming. 7 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 192.

PETITORY ACTION by respondent to recover from appellant a piece of land which the former acquired by deed of sale from one John Rose. Appellant who denies the ownership of John Rose was at the time of the passing of said deed of sale, and has since been in possession of the property claimed in this suit.

According to the evidence adduced the ownership of John Rose is sufficiently established, and that the Respondent is therefore entitled to the possesion of said property. *Rose & Rose.* M. Judgment confirming, 29 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 185.

Sans alléguer dol, fraude ou erreur, le cessionnaire d'usufruit d'un immeuble à la charge expresse de le conserver et remettre au seul enfant et héritier de sa mère à sa majorité en le reconnaissant comme propriétaire, ne peut pas valablement invoquer le défaut d'une déclaration expresse de dissolution de la communauté entre ses père et mère, dans une instance au pétitoire prise par le fils devenu majeur. *Bourassa & Lacerte.* Q. Judgment reversing, 7 May, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Baby, J. dissenting. Rep. 11 Q. L. R. 242.

PEW.—A pew in church which a member of the congregation holds on certain conditions, may be arbitrarily taken away from him, and be given to another, at the discretion of the Trustees of the church, under the general powers conferred upon them by their nomination as such Trustees. *Johnson & The Minister and Trustees of St. Andrews Chuch.* M. Judgment confirming, 3 February, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Dorion, C. J., and Ramsay, J., dis.

NOTE.—On appeal to the Supreme Court this judgment was reversed. 1 S. C. Rep. 235.

The use of a pew in church was ceded to a parishoner with the condition that the occupant should forfeit his privi-

ledge to have the use of the pew in case "*la dite œuvre et fabrique fut obligée de poursuivre en justice pour en être payée.* The occupant failed to pay, but before anything was done, and before he was sued, he tendered the rent. *Held*, that having tendered the rent before suit, the condition established by the contract did not occur; that acquiescence to bind the party must be some voluntary act, and not a submission to proceedings the party cannot prevent; that the party could not prevent the adjudication of the pew over his head, and he protested constantly against the proceeding by continuing to sit in the pew. *La Fabrique de Trois-Pistoles & Belanger.* Q. Judgment confirming, 7 October, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Baby, J., diss. 14 Rev. Leg. 575. 9 Leg. News 346.

Mandamus will not lie to compel the Corporation of the Curé & Marguilliers to admit the complainant to his place in church. *Robillard & Le Curé et Marguillers de St Clément.* M. Judgment confirming, 22 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay, J., diss. Rep. 8 Rev. Leg. 63.

PHARMACEUTICAL SOCIETY. — En vertu de la section 8 de l'acte 48 Vict., ch. 36, Québec, l'Appelant qui a, dans les douze mois de la passation de cette loi, produit au régistrataire de l'Association Pharmaceutique de la Province de Québec (l'Intimée), la preuve qu'il a pendant plus de vingt-cinq ans avant la mise en vigueur du dit acte exercé la profession de chimiste, droguiste et apothicaire dans la Province de Québec, a le droit de se faire inscrire par l'Intimée au nombre de ses membres avec le titre de licencié en pharmacie *Brunet & l'Association Pharmaceutique de la Province de Québec.* M. Judgment reversing, 27 January, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Dec. d'A. 289.

PLEDGE.—Is a contract by which a thing is placed in the hands of a creditor or, being already in his possession, is retained by him with the owner's consent in security for his debt. 1966 C. C.

The thing may be given either by the debtor or by a third person in his behalf. 1967 C. C.

A deed purporting to be a deed of sale may really only constitute a pledge. *Gordon et al. & Hotte.* M. Judgment confirming, 16 September, 1870. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 348.

Where an agreement is in the nature of a pledge, and the property remains in the possession of the owner till after his insolvency, the party to whom it has been pledged has no *lien* over them. *Parent & Falardeau.* Q. Judgment confirming, 5 June, 1880; Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A sale of moveables with a *contre-lettre* stipulating this sale was only passed to secure the payment of money due to the apparent purchaser, with the condition that the latter should retrocede the moveables as soon as the debt was paid, constituted a pledge and not a sale. *Cary & The Paper Company of Canada et al.* Q. Judgment confirming, 5 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 501.

A quantity of timber was pledged for the payment of a draft, and if the draft was not paid, the holder was to sell the wood and place the proceeds to the owner's credit. The draft was not paid, the owner of the wood became insolvent, and the pledgee sold the wood, of which he never had had actual delivery. *Held*, that the pledgee could not place the balance of the price of sale, after paying the draft, to the credit of a former indebteness of the owner to himself. *Perkins & Ross.* Q. Judgment reversing, 8 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 6 Q. L. R. 65. 10 Rev. Leg. 263.

POSSESSION.—*v.* WRIT OF POSSESSION. —A married woman separated as to property has the legal possession of her

separate estate, though in her husband's domicile. *The City of Montreal & Greene.* M. Judgment confirming, 15 May, 1879.

Possession of moveables by wife.— Where a wife by opposition claims her moveables seized in the possession of her husband, and she establishes by evidence that all the things claimed by her, except a few articles of trifling value are hers, the court is justified in deferring to her the judicial oath to complete the proof. *May & L'Heureux.* M. Judgment confirming, 22 March, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News, 110.

POSSESSORY ACTION. — F. married M. D. without any contract of marriage. She died leaving no issue, and by her will she bequeathed all her property to her husband. Among her property there was a lot of land a *propre* of the wife's substituted to D. Later F. went to cut wood on this lot of land and was prevented by D., and F. brought his possessory action against D. F. had no annual possession apart from his wife. *Held*, confirming the judgment of the Superior Court that F. had no possession of this lot of land with his wife, and that he had no quality under the will to claim possession. *Fiset & Dubuc.* Judgment confirming, June, 1879. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Taschereau and Sicotte, JJ. dis.

A *procès-verbal* made by a land surveyor on the lines of old works, by consent of and at the demand of the Defendant, is a recognition of Plaintiff's possessory rights, and Defendant will be liable for damages for cutting wood on the property so in possession of Plaintiff. *Lalonde & Bélanger.* M. Judgment confirming, December, 1875.

A purchaser by licitation cannot take possession of the property purchased, but must demand possession by lawful process. *Hus & Millette et al.* M. Judgment confirming, 21 Dec., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 9 Rev. Leg. 56.

Adam & de Gaspé. Note. There were five cases all involving the same questions, and the whole turned upon matters of fact. The judgments were rendered in September 1874. Rep. 6 Rev. Leg. 411. Confirmed in the Privy Council.

POSSIDENS.—A seizure on a curator *non possidente* will be set aside on opposition. *Tempest et al. & Baby et al.* M. Judgment confirming, 20 Sep., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Dec. d'A. 371.

POST-OFFICE.—The Defendant, endorser of a promissory note, pleaded that the notice of protest had been mailed too late. The evidence in support of the plea was that of the officers of the post-office, the letter showed by the stamping that it was posted a day too late. On the other hand the notary swore positively to the posting by his own hand. The Court was of opinion that the positive testimony of the notary was a stronger evidence than that of officers who swore to a practice. *Doutre & La Banque Jacques-Cartier.* M. Judgment confirming, 29th Jan., 1873. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

POWDER.—*Held*: That a powder manufactory where a quantity of powder exceeding 25 lbs, is kept, is a powder magazine within the meaning of 41 Vict. (Q.) C. 3 S. 170.

(By the majority of the Court):— That the Act above cited, which imposes a penalty for failing to take out a licence, is not *ultra vires*, being in the nature of a police regulation, and as such within the powers of the local legislature, even supposing the provision of the Act requiring a fee of $50 to be paid for a license were *ultra vires* as a revenue tax.

(By Ramsay J.)—That the Act is valid, not as a police regulation, but as a licence Act, the local legislatures having power, under the B. N. A. Act, sect. 92, ss. 9, to pass an Act for raising revenue by a licence fee. *The Hamilton Powder Co. & Lamb.* M.

Judgment confirming, 23 November, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J. dissenting as to reasons. Rep. M. L. R. I. Q. B. 460. 14 Rev. L. 254.

POWERS OF LOCAL LEGISLATURE, UNDER BRITISH NORTH AMERICA ACT, 1867.—*v.* LEGISLATIVE POWERS.

POWER OF ATTORNEY.—Where there is a written power, the statements made by the agent that he had full authority to sign notes for his principal, cannot make evidence against the principal, his power being governed by the written power. *St. Jean & Serre.* M. Judgment reversing, 16 September, 1876. Monk, Ramsay, Sanborn, Tessier, Belanger, JJ. Rep. 21 J. 207.

NOTE. — This holding goes rather beyond the report. The judgment does not expressly say that where there is a written power there can be none other; nor do I think it implies it. The conditions were these.—there was a written power on which the agent acted, he gave verbal explanations as to the extent of the power, to which the bank trusted and these explanations were untrue. The bank chose to trust the agent, and did so at its own risk.

The power of attorney under authority of which an agent acts must be proved in a default case. *Forneret & Lavallée.* M. Judgment confirming, 15 march, 1876. Sir A. A. Dorion, C J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 7 Rev. Leg. 611.

Indictment under 32 and 33 Vict., ch. 21, section 78, which is as follows :

"Whatsoever, *being intrusted* either "solely or jointly with any other per "son, with any *power of attorney for* "*the sale or transfer* of any *property*, "fraudulently sells or transfers, or "otherwise converts the same or any "part thereof to his own use or benefit, "or to the use or benefit of any person "other than the person by whom he "was so intrusted, is guilty of a misde- "meanor, and shall be liable to any of "the punishments which the Court "may award as hereinbefore last men- "tioned."

Held: That the Power of Attorney, mentioned in section 78, of 32 and 33 Vict., ch. 21, must be a *written Power of Attorney*, and oral testimony of a verbal power of Attorney will not bring the Defendant's act within the scope of that statute. *Regina & Chorimand.* Q. Reserved case, conviction quashed. 8 September, 1874.

Where a party gives a power authorizing another to make and endorse promissory notes for all matters "arising out of transactions connected with the business of the constituent only" do not cast on a banker, receiving such notes in the ordinary course of business and in good faith, the obligation to enquire and know whether the agent had mis-used his trust and given the notes for other consideration. *The Molson's Bank & Commerce.* M. Judgment reversing, 21 Dec., 1878. Dorion, C. J., Monk, Ramsay, Cross, Routhier, JJ.

POWERS. — Special power being granted to a railway company to perform certain works within the limits of a municipal corporation, and in the exercise of such powers, injury is done to a proprietor by interfering unnecessarily with the street leading to his house, such proprietor will have no action against the municipal corporation, but must seek his remedy against the company. *Corporation of Three Rivers & Lambert.* Q. Judgment confirming, 5 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J. dis. Rep. 10 Rev. Leg. 359.

PRESCRIPTION is a mean of acquiring or of being discharged by lapse of time and subject to conditions established by-law. In positive prescription title is presumed or confirmed, and ownership is transferred to a possessor by the continuance of his possession.

Extinctive or negative prescription is a bar to and in some cases precludes any action for the fulfilment of an obligation or acknowledgment of a

right, when the creditor has not preferred his claim within the time fixed by-law. 2183 C. C.

PRESCRIPTIONS STYLED LIMITATIONS.—Prescription must be pleaded in all the cases mentioned in articles 2250, 2260, 2261 and 2262 C. C. The right of action in these cases not being "denied." *Lamontagne & Dufresne et al.* M. Judgment confirming, Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

NOTE.—See opinion of Aylwin and Badgley, JJ. in *Wilson & Demers*, 2 L. C. L. J. 251.

The short prescriptions referred to in articles 2250, 2260, 2261 and 2262 of the Civil Code are liable to be renounced and interrupted, in the manner prescribed by art. 2227. *Walker & Sweet.* M. Judgment reversing, 21 Dec., 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Reported 21 J. 29.

Where the action is not an action for damages resulting from an offence or quasi-offence, but merely claims the price or value of materials wrongfully taken away, the two years' prescription under C. C. 2261 does not apply.

That a corporation is not liable for the manner in which its contractor executes his work. *Robert & The City of Montreal.* M. Judgment confirming, 30 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, Baby, JJ., dissenting as to second motive. Reported 4 Leg. News 292, 2 Dec. d'A. 68.

Only five years arrears of *rentes constituées* can be recovered. *Tousigny & Blais.* Q. Judgment reversing, 8 September, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Days of grace.—The prescription of a promissory note does not commence to run until after the expiration of the last day of grace. *Ste. Marie & Stone.* M. Judgment confirming, 27 Sep., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Leg. News 322, 2 Dec. d'A. 369.

A loan of money by a non-trader to a commercial firm is not a "commercial matter," or a debt of a "commercial nature," and is not, therefore, prescriptible by the lapse of either six or five years.

The prescription, under the Code, of five years against arrears of interest cannot be invoked in respect of a debt due prior to the coming into force of the Code. *Darling & Brown et al.* M. Judgment confirming, 22 June, 1876. Rep. 21 J. 92.

Prescription of ten years does not apply to a demand to set aside a simulated deed. *Dorion & Dorion.* M. Judgment confirming, 31 October, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 3 Dec. d'A. 376.

L'Appelant ayant été condamné par jugement de la Cour Supérieure à payer à un nommé Francis McCaffrey le montant d'un billet fait à l'ordre de l'Intimé et endossé par ce dernier en faveur de l'Appelant:

Jugé, par la Cour d'Appel, infirmant le jugement de la Cour Supérieure.

1o. Que la demande en justice et le jugement par McCaffrey contre l'Appelant, ont interrompu la prescription, tant à l'égard de l'Intimé qu'à l'égard de l'Appelant;

2o. Que pour recouvrer de l'Intimé les frais payés à son procureur par l'Appelant dans l'action intentée contre lui par McCaffrey, l'Appelant aurait dû appeler l'Intimé en garantie. *Hart & Beauchemin.* Q. Judgment reversing, 3 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 307.

Where land was given to the City of Montreal to be used as a public market, and the City, long after, converted it into a public thoroughfare, and registered the same in the register of public

streets and squares: *Held*, that the donors were not entitled after the lapse of ten years, to claim the rescission of the donation on the ground of such conversion. *Chevigny de la Chevrotière & The City of Montreal.* M. Judgment confirming, 19 September, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 6 Leg. News 348.

Only five years arrears of *rentes constituées* can be recovered. *Tousigny & Blais.* Q. Judgment reversing, 8 Sep., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Public road.—Servitude. — A road opened and used by the public as such, without contestation during ten years or upwards, is to be considered as a public road. *Myrand & Légaré.* Q. Judgment confirming, 3 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 6 L. C. R., 120.

NOTE.—The judgment of the Court below turned on the assumption that the Defendant's land was *enclouée.* It is obvious from the remarks of the Chief Justice that the decision of the Q. B. is based on another principle, namely that the public had obtained not a servitude, but the road itself by prescription.

Art. 2188 C. C. forbids the court of its own motion to supply the defence resulting from preecription, except where the right of action is denied. Art. 2267 C. C. Maintained after the delay for prescription has expired in the cases mentioned in articles 2250, 2260, 2261 and 2662 C. C. In the French version of art. 2188 the words "*sauf dans les cas où la loi denie l'action.*" In the French version of art. 2267, "*nulle action ne peut être reçue.*" The prescription of art. 2150 is not a *denial* of the action and the court will not supply the defence unless pleaded. The Court of Appeals modified the judgment as to the value of the land for use and occupation, but did not supply the defence of prescription. *Carter & Breakey.* Q. Judgment modifying, 7 May, 1884 Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ. dis. In the Supreme Court this judgment was reversed by allowing a higher rate of value for the use and occupation of the land, but the defence of prescription was not supplied.

PRESUMPTIONS.—*v.* RENT.

Presumptions are either established by law or arise from facts which are left to the discretion of the courts. 1238 C. C.

Legal presumptions are those which are specially attacked by land to certain facts. They exempt from making other proof those in whose favor they exist; certain of them may be contradicted by other proof; others are presumptions *juris et de jure* and cannot be contradicted. 1239 C. C.

Presumptions not established by law are left to the discretion and judgment of the Court. 1242 C. C.

The presumption is that the endorsers of a promissory note are liable according to the order of endorsation, but this presumption may be repelled by evidence that such was not the intention of the endorsers. *Leveillé & Daigle.* M. Judgment confirming, 17 September, 1880. Sir A. A. Dorion, C. J., Monk. Ramsay, Tessier, Cross, JJ. 2 Dec. d'A. 129.

The possession of a promissory note gives rise to the presumption that the holder is owner, unless the possession be otherwise explained. *Cruice et al. & Darmody.* M. Judgment confirming. December, 1875. Dorion, C. J., Monk. Ramsay, Sanborn, JJ.

The presumption that the subsequent endorser of a promissory note is protected by the former endorser is not affected by the fact that both endorsed for the accommodation of the drawer. *Whitfield & McDonald.* M. Judgment reversing, 23 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 26 J. 69.

The presumption arising from the

giving up a paper may be rebutted. *Lanctot & Poissant.* M. Judgment reforming, 14 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

PRIVILEGE.—A privilege is a right which a creditor has of being preferred to other creditors according to the origin of his claim. It result from the law and is indivisible of its nature. 1983 C. C.

Among privileged creditors, preference is regulated by the different qualities of the privilege or the origin of the claims. 1984 C. C.

Privileged claims of equal rank are paid rateably. 1985 C. C.

Que les provisions de l'article 1998 C. C. limitant l'exercice du privilège du vendeur aux quinze jours qui suivent la vente dans les cas de faillite, s'appliquent non seulement au cas de faillite sous l'empire d'un acte de faillite, mais au cas d'insolvabilité sous le droit commun, quand un commerçant cesse ses paiements. (Art. 17, § 23).

Lorsque l'acheteur y consent, le vendeur qui est dans les conditions voulues pour revendiquer, peut se faire remettre à l'amiable les marchandises vendues sans avoir besoin de les faire saisir par voie de revendication.

L'expression "les quinze jours qui suivent la vente" dans le dit Art. 1998, doit s'entendre de la vente parfaite, et partant si les marchandises sont vendues au poids, au compte ou à la mesure, et non en bloc (Art. 1474, C. C.) le délai pour revendiquer ne commencera à courir que du moment où elles auront été pesées, comptées ou mesurées. *Thibaudeau & Mills.* M. Judgment confirming, 21 March, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 326. 4 Dec. d'A. 204.

En vertu de l'art. 2013 C. C., le constructeur qui a observé les formalités requises par cet article n'a de privilège que sur la plus-value donnée à l'héritage par les constructions qu'il y a faites, et qu'il n'a aucun privilège ou hypothèque sur le fonds même de l'héritage.

L'enrégistrement du procès-verbal requis par l'art. 2013 C. C., pour la préservation du dit privilége ne crée pas sur l'immeuble une hypothèque tacite en faveur du constructeur. *La Corporation du Séminaire de St. Hyacinthe & La Banque de St. Hyacinthe.* M. Judgment reversing, 25 September, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dissenting. Rep. M. L. R. I. Q. B. 396. 4 Dec. d'A. 293.

Statutory.—Where a statutory privilege is accorded to construct a toll-bridge, and where by the Statute according such power it was enacted "that after said bridge should be open for the public no persons should erect or cause to be erected any bridge or bridges, or maintain or cause to be maintained any means of commnication for the carriage of any person, cattle or carriage whatsoever for hire, across the said branch of the River Yamaska, at the place above mentioned anywhere within one mile above and one mile and a half below the said bridge under a penalty of a fine of forty shillings currency for each person, animal or carriage conveyed across the said river on any bridge or means of communication constructed and maintained for hire, provided nothing in said act should be construed to deprive the public of the right of crossing the said river within the limits aforesaid, by fording or in canoes or otherwise without payment." A large number of people built a subscription bridge within the limits of the said statutory privilege, avowedly with the object of avoiding the use of the toll-bridge and depriving the owner of the privilege of his custom. *Held*, that this was an indirect mode of defeating the privilege aforesaid, and that the Defendents should be condemned to demolish the bridge by them constructed. *Girard & Bélanger et al.* M. Judgment reversing, September, 1874. Monk, Taschereau, Ramsay, Sanborn, Bélanger, JJ.

Privilege and Maritime Lien—for

supplies to steamers under art. 2383 § 5 C. C. *v.* MARITIME LIEN.

To secure the builders privilege accorded by article 2013 C. C., the builder must take the steps required by law, and it is not sufficient that he should do something of a similar kind. So an expertise made subsequent to the work is not that comtemplated by the article of the Civil Code. And the privilege only dates from the registration of the Statement. *Robert et al. & Rieutord.* M. Judgment reversing, 26 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Of the Crown.—The privilege of the Crown for its claims over those of private competing creditors being one of the minor prerogatives, is to be governed by the law of Lower Canada derived from France, and not by the law of England.

Under C. C. P. 611, (1) in the absence of any special privilege, the Crown has a preference over chirographic creditors for deposits due to it by a bank in liquidation. (2) *Regina & The Exchange Bank.* M. Judgment reversing, 2 April, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ. Sir A. A. Dorion, C. J. dis. Rep. M. L. R. I. Q. B. 302.

Privity of contract is not a technicality of our law. A creditor, to save a circuit of actions. may under our law, sue the debtor of his debtor.

The sale of certain things, and the obligation to pay certain debts, together with the good will of the business will be enterpreted as an undertaking to pay a draft given to a bank and not necessarily mentioned in a schedule as part of the transactions, or by the Defendant known to be part of the transactions in question. *Hood & The Bank of Toronto.* M. Judgment reversing, 19 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk and Tessier, JJ. dis. Rep. 3 Leg. News 234.

Where a contract to supply flour was transferred to another firm, and they agreed to carry on the business on condition of cash on delivery or security on draft at 30 days, no action will lie against the second party, for insisting on these conditions, although they were not shipped by the party originally applied to. *Tourigny & Wheeler et al.* Q. Judgment, 2 May, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

PRIVY COUNCIL.—An appeal lies to Her Majesty in Her Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench :

1. In all cases where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to Her Majesty ;

2. In cases concerning titles to lands or tenements, annual rents and other matters by which the rights in future of parties may be affected ;

3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling." C. C. P. 1178.

Leave to appeal to the Privy Council is only granted from final judgments.

Leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench, Quebec, will be granted, although the opposite party has already obtained leave to appeal to the Supreme Court of Canada. *The City of Montreal & Devlin.* Judgment 22 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Rep. 1 Leg. News 151.

Under the Insolvent Act of 1875, the appeal to the Privy Council is not taken away. See sections 8 and 128. *Knight & La Banque Nationale.* Q. Judgment 8 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

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(1) In the absence of any special privilege the Crown has a preference over chirographic creditors for sums due to it by the defendant.

(2) This judgment has since been reversed in Privy Council. ED.

The defendant has a right to appeal to the Privy Council from a judgment on an action to set aside a Crown Patent, establishing Respondent's title to lands. *Pacaud & Rickaby.* Q. Judgment 4 Dec., 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

An appeal to the Privy Council can be allowed only from a final judgment. But as a judgment dismissing an attachment before judgment cannot be remedied at any other stage of the case, the Court holds that the judgment was a final one, and the motion for leave to appeal to the Privy Council must therefore be granted. *Dallimore & Brooke.* M. Judgment Sep. 1874.

Wotherspoon's C. C. P. note to art. 1178.

Leave to appeal to the Privy Council will be granted from a judgment maintaining a *capias. Goldring & The Hochelaga Bank.* M. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 232.

Commissioners were appointed for the expropriation of certain real estate in Montreal, under 27 and 28 Vic. 1 c. 60. They made an award, which the Corporation thought extravagant, and before the homologation of the report, the Corporation moved the Superior Court to have the Commissioners removed for want of diligence and fidelity in the discharge of their duties, (sect. 8.) This motion was granted and new Commissioners were appointed. The Commissioners appealed to this Court and the judgment of the Superior Court was reversed. Leave to appeal to the Privy Council was resisted on the ground that this was an Interlocutory Judgment. *Held*, that it was final as regards the Commissioners. Leave granted. *Brown et al & The Mayor, &c., of Montreal.* Judgment, 1874.

There is an appeal to the Privy Council from a judgment setting aside an injunction, if the amount involved be sufficient, or if the subject matter be of a nature to permit of an appeal in an ordinary case. *McDonald & Joly.*

M. Judgment, 22 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. 2 Leg. News 104.

No appeal lies to the Privy Council from a judgment upon demurrer, for there is nothing in the judgment which cannot be remedied after final judgment; the judgment is merely interlocutory, and motion for leave to appeal to the Privy Council cannot be granted. *Brooke & Blomfield.* M. Judgment, 21 Sep., 1874.

Wotherspoon's C. P. C., note to article 1178.

The judgment granting a new trial is Interlocutory, and leave to appeal to the Privy Council, will not therefore be granted. *South Eastern Counties Railway Co. & Lambkin.* M. Judgment, 13 June, 1877.

NOTE.—Application was subsequently made to the Judicial Committee for leave to appeal, and it was granted, and the judgment granting a new trial was reversed. It is considered that this decision of the judicial committee does not reverse the rule that leave to appeal will not be granted on an interlocutory judgment by the Court of Queen's Bench.

Leave to appeal to the Privy Council will not be granted from a judgment refusing to discharge a party arrested under the warrant of the Speaker of the House of Assembly of the Quebec Legislature. It is because the case was a criminal case? The judges were divided. *Exp. Dansereau.* M. Judgment, 19 Feb., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal to the Privy Council will not be granted from a judgment maintaining a prohibition against the council of the bar. *O'Farrell & Brassard.* Q. Judgment, 4 March, 1878, Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 115.

Leave to appeal to the Privy Council will be refused on the application of

a relation from the judgment of the Court of Queen's Bench, allowing a writ of Prohibition to issue, restraining the Council of a section of the bar. *O'Farrell & Brossard.* Judgment, 4 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 115.

The amount originally in issue must govern the right of Appeal to the Privy Council. And even where there is a cross-demand for an amount in itself, not appealable, it is so connected with the original case as to form part of the matter in dispute in the case, and it is therefore appealable. *Bartley & Bartlett & E. Contra.* M. Judgment, 14 Dec., 1877.

In calculating the amount necessary to make a case appealable, the interest accrued during the suit, cannot be considered. *Stanton & The Home Insuance Co.* M. Judgment, 20 September, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 314, 24 J. 38. (1)

Where the action is to recover back a sum of money exacted illegally from the Appellant under an assessment, the validity of the roll not being in question, leave to appeal to the Privy Council will not be granted. Future rights, at least such rights as are contemplated by the article, are not affected by the judgment. If the roll were in existence for three years, the total amount at stake would not give the right of appeal. *Valois & Les Commissaires d'Ecole d'Hochelaga,* also *Lussier & The same.* M. Judgment, 17 Sep., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 309.

The certificate of the Registrar of the Privy Council stated that the case "stand-referred" to the Privy Council, and it was moved that the record should be ordered back to the Superior Court because this certificate does not show that any proceedings had been taken within six months. Motion refused. *The Mayor &c. of Montreal & Brown.* Judgment, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. (1)

A judge of the Court of Queen's Bench has power to extend the delay for giving the security on an appeal to the Privy Council beyond the delay ordered by the Court, as that within which security must be given, when such judge is seized of the matter before the expiration of the delay originally granted ; and when security is given within such extended delay, the Respondent cannot execute the judgment appealed from. *The Mayor &c. of Montreal & Hubert et al.* M. Judgment, 21 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 85.

On motion, and by consent of both parties, an *acte argué de faux* may be ordered to be sent to the Privy Council. *Panet & Hamel.* Q. Judgment, 3 June, 1875. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

PROBABLE CAUSE. — *v.* DAMAGES.— MALICIOUS PROSECUTION. — PROTHONOTARY.

"It is sufficient to support an action for malicious prosecution if the prosecutor, (defendant) while complaining that a sum entrusted to the accused (plaintiff), a commission merchant, had not been employed according to instructions, and that part had been misappropriated, endeavored to compound what he pretended was a felony by warning the accused to settle to save further trouble, and held back the warrant for nineteen months after laying the information, in order to coerce him to settle, though the prosecutor had obtained a legal opinion that it was a case of felony, and acted thereon. M. Judgment reversing, 22 June, 1874. Dorion, C. J., Taschereau, Ramsay, Sanborn, Loranger, JJ., Ramsay & San-

(1) NOTE.—Two cases were decided in the same sense, one 21 Dec. 1872, the other 22 Sep, 1873, consequently before the time covered by this index. Wotherspoon's C. C, P. note to art. 1178.

(1) In the Privy Council the appeal was dismissed.

born, JJ. dis. Rep. 23 J. 184. 9 Rev. Leg. 656.

In an action of damages for accusing another wrongfully of perjury, there must be not only malice, but want of probable cause. *Beauchemin & Trudeau.* M. Judgment confirming, September, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The Plaintiff and others pulled down a small cottage and carried it away and used the timber for making fences. The owner of the house had them arrested for larceny. *Held,* confirming the judgment of the Superior Court that there was no probable cause for the arrest. *De Beaujeu & Adam.* M. Judgment confirming, September, 1874. Dorion C. J., Taschereau, Ramsay, Sanborn, McKay JJ. Ramsay & McKay, JJ. Dis.

Lafond & Picotte. M. Judgment confirming, December, 1874. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

PREUVE AVANT FAIRE DROIT.—Leave to appeal will not be granted from an order suspending a demurrer in order to make proof before deciding the law issue, unless it is clear that the evidence would be useless. *Jobin & Barbeau.* Q. Judgment rejecting the motion, 5 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

PROCEDURE.

§ 1. Accountant.
§ 2. Amendment of Declaration.
§ 3. Matter of Record.
§ 4. Dilatory Exception.
§ 5. Preliminary Plea.
§ 6. Declinatory Exception.
§ 7. Exception to the Form.
§ 8. Service of Summons.
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§ 10. Demand of Plea.
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§ 17. Evidence.
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§ 20. Intervention.
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§ 25. Nullité de Décret.
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§ 27. Service at the Prothonotary's Office.
§ 28. Appeal to Privy Council.
§ 29. Assessment.
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§ 31. Litispendence.
§ 32. Consolidation of Causes.
§ 33. Peremption.
§ 34. Reopening Enquete.
§ 35. Delays.
§ 36. Appeal.

§ 1. *Accountant.*—In an action to recover back monies alleged to have been paid to respondent as his share of certain supposed profits which appellant alleges afterwards proved to be losses, that the court may without the consent of the parties refer the matters in dispute to an accountant, when the Court is of opinion that the evidence adduced is contradictory and unsatisfactory. *The Canada Paper Co. & Bannatyne.* M. Judgment reversing, 23 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Reported 26 J. 124.

§ 2. *Amendment of declaration.*—Under art. 53 C. C. P. a declaration may be amended in all cases, except when it changes the nature of the action, on leave of the Court, and at any stage of the proceedings, even after argument on the merits. *The Merchant's Bank & McGreevy.* Q. Judgment reversing, 4 Dec., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Where a motion to amend the declaration in the case is of such a nature as materially to alter the allegations and conclusions, an opportunity to answer the declaration as amended should be afforded to the Defendant, and therefore a judgment granting such motion and pronouncing finally on the

merits of the case at the same time will be reversed. *Montrait & Williams.* M. Judgment reversing, 22 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 22 J. 19.

§ 3. *Matter of Record.*—The date of actual return of an action, as established by the paraph of the Prothonotary and the register of the court, cannot be contradicted by affidavits. *Ross & Marceau.* M. Judgment reversing, 16 Sep., 1879. Rep. 24 L. C. J. 143. 2 Leg. News, 310. 10 Leg. 143.

§ 4 *Exception dilatoire.*—A Plaintiff has a right to demand by *exception dilatoire* he be given time to call in his *garant*, and until the *garant* is bound to plead to the action *en garantie.* C. C. P. 120-4 and 122. *Ross & La Banque Nationale.* Q. Judgment reversing, 7 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J. dis.

Where a party has failed to appear, and obtains leave to appear from the Court, he may file a dilatory plea asking for security for costs from a stranger. *Hill & Ware.* Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A dilatory exception was filed, asking for security for costs; security was given by the Plaintiff, but no judgment was rendered on the exception. This omission not causing any injustice to the Plaintiff, who did not complain in due time, was not ground for an appeal. *Bowen et al. & Gordon et al.* M. Judgment confirming, 19 January, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 300.

§ 5 *Preliminary plea.—Deposit.*—An opposition *a jugement* filed by Defendants, under Art. 484 of the Code of C. P., on the sole grouud that one of them has been summoned by a wrong name, is in the nature of a preliminary exception to the action, and must, consequently, be accompanied by a deposit required by art. 112 of the Code of C. P., in addition to that required by art. 486 of the same Code. *Jubinville et al. & The Bank of British North America.* M. Judgment confirming, 20 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Rep. 18 J. 237.

§ 6 *Declinatory exception.* A policy of fire insurance effected on a building at Quebec, although the policy be dated at Montreal, gives right of action in case of fire at Quebec. *The Scottish Commercial Insurance Company & O'Mally.* Q. Judgment confirming, 7 August, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J., dis.

When a subscription to the capital stock of a joint-stock company, having its chief office in Montreal, is made by a Defendant domiciled in another district, the subscription being made in such other district the Defendant cannot be summoned to answer in the District of Montreal, in an action for calls on such stock. *The National Insurance Co. & Paige.* Judgment confirming, 4 Feb., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 187. 2 Leg. News 93.

An objection to the local jurisdiction of the Court, if not pleaded, will be considered to be waived. *Gray & Dubuc.* Q. Judgment confirming, 5 September, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 2 Q. L. R. 234.

Where a declinatory plea is filed without stamps and beyond the delay allowed by law (Art. 107 C. C. P.) it will be rejected on motion of Plaintiff. *Thompson & Cimon.* Q. Judgment confirming, 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. 1 Dec. d'A. 86.

§ 7. *Exception to the form.*—An *exception à la forme* which states that no proper service had been made upon the defendant is not *libellée* as required by law, inasmuch as it does not state the particular defect in the service which is complained of, and such *exception à la forme* should be dismissed. *Beaufoy & Feek.* M. Judgment reversed, 16 Sep. 1875. Dorion, C. J.,

Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 20 J. 182.

When the law declare that service may be validly made on the President of a company, without saying *personally*, the service may be made at the President's domicile. *Board of Temporalities & Munster & Trustees of St Andrew's Church.* Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 3 Leg. News 379.

Where the defendant filed an exception *à la forme*, and the Plaintiff amended his declaration, and the defendant was not further heard on his exception which was dismissed, he will not be granted leave to appeal from the judgment dismissing the exception, if it appears that the amendment covered all valid grounds of exception *à la forme*. *Lee Mallette & Tremblay*, 14 L. C. J. 209. *Pacaud & Demers.* Q. Judgment 7 December, 1875.

In a district where there is no rule of practice fixing the hours of opening and closing the Prothonotary's office, but where the office was usually closed at 4 p. m., an *exception à la forme* filed between 4 and 5 p. m. is properly filed. *The Carillon & Granville Railway Company & Burch.* Judgment reversing, 18 Dec., 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 46. 9 Rev. Leg. 3.

A firm originally composed of two partners, admitted a third. The change was not registered, and the firm was sued as if composed of the first two partners only. Service was made at the place of business of the new firm. *Held*, that the plaintiffs were entitled to amend the writ by inserting the name of the new partner, and an exception to the form, attacking the amendment, pleaded by the new partner when thus brought into the case, was dismissed. *Eastern Townships Bank & Morrill.* M. Judgment reversing, 14 December 1877. Dorion, C. J., Monk, Ramsay. Tessier, Cross, JJ. Rep. 1 Leg. News 28.

§ 8. *Service of Summons.*—Where the service of summons is personal, at a place other than his domicile, the delay to appear is computed according to the distance of the place of such service, and not according to the distance of Defendant's domicile to the place where the court is held. *Smith & Donovan.* M. Judgment confirming, 16 Leg. 1875. Rep. 19 J. 336.

An opposition to a sale on a *vendition exponas* may be dismissed on motion, where there is nothing to show that the advertisements and publications have not been made upon the first writ, and where there is no judge's order. *Delinelle & Armstrong et al.* M. Judgment confirming, 14 may, 1879. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 182. 10 Rev. Leg. 315.

La signification d'un bref d'appel, faite au procureur *ad litem* de la partie adverse, en personne, dans les Etats-Unis d'Amérique, où il se trouve en villégiature, est légale (art. 1123 C. P. C.) *Gilmour & Hall.* M. Motion de l'Intimé renvoyée sans frais, 21 Sep., 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 14 Rev. Leg. 524.

A witness coming into a District in which he is not domiciled, under a duly signified writ of subpœna, may be validly served therein with summons *ad respondendum*. *Bruneau & McCaffrey.* Q Judgment reversing, 8 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Q. L. R. 364, 1 Dec. d'A. 313, 11 R. Leg. 253.

Where the Plaintiff has been duly called in by advertisement, the service of his copy of a *tiers-saisie* at the Prothonotary's office is valid. *Santoire et al. & Turcot.* M. Judgment reversing, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

Where damages are asked and all the ground of action occurred in two districts, the Defendary can only be sued in the district of his own domicile, or where he is served personally. So where De-

fendant began a prosecution against Plaintiff before the police magistrate, by accusing him of theft, and a warrant was issued and the Plaintiff was arrested in the district of Iberville, service on the Defendant in the district of Bedford, where he resides, summoning him to answer an action of damages in the district of Montreal for the above criminal proceedings, is insufficient. *Bolduc & Archambault.* M. Judgment reversing, 24 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dissenting thought that the service was sufficient, that the cause of action was the complaint which was made in Montreal, and that the other proceedings were merely accessory and incidental.

Pour permettre à un Demandeur d'assigner le Défendeur dans un autre district que celui de son domicile, en vertu de l'art. 34 C.P.C., (1) sous le prétexte que l'action est portée dans le district où le droit d'action a pris naissance, il faut que ce droit ait pris naissance dans différents districts, l'action devra être portée devant le tribunal du domicile du défendeur, à moins qu'il ne soit assigné personnellement dans un autre district. *Faucher & Brown,* M. Judgment confirming, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 168.

§ 9 *Misnomer.*—An exception *à la forme* will not be sustained on the ground that a party is not designated by his proper name, if he be designated by the initials of his christian name by which he signed part of the proceedings. *Wilson & Rafter.* M. Judgment confirming, 14 June, 1879. Monk, Ramsay, Tessier, Cross, Sicotte, JJ. Rep 2. Leg. News 211.

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(1) In matters purely personal other than those mentioned in Arts 35, 36, 38, 40 and 42, the Defendant may be summoned either. —1 Before the Court of his domicile. 2. Before the Court of the place where the demand is served upon him personally, or 3. Before the Court of the place where the right of action originated.

§ 10. *Demand of plea*—can only be made after the delay for pleading has expired, and a foreclosure on a demand made before this will be set aside as irregular. *The Corporation of Ireland & Larochelle.* Q. Judgment reversing, 5 Oct., 1882. Sir A. A. Dorion, C. J., Ramsay, Cross and Baby, JJ.

§ 11. *Discontinuance on, not allowed.* —After a case has been submitted to the Court on the merits, the Plaintiff is not entitled to discontinue the action on payment of costs. *Williamson & Rhind.* M. Judgment confirming, 22 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 22 J. 166.

§ 12. *Exhibits.* — A party must give notice of his inscription at enquete and merits, to the opposite party under art. 317 C. C. P.

According to the 30 Rule of Practice of the Superior Court, a party who has not produced his exhibits with his declaration, cannot produce them without giving notice to the Defendant, and cannot be foreclosed from pleading before the production of the exhibits. *Guilbault et al & Vadenais.* M. Judgment reversing, 15 February, 1881. Reported 1 Dec. d'A. 228.

Where a marriage license was not filed at the proper time by the clergyman sued in damages, and was afterwards irregularly produced at *enquête.* the Court should not have excluded the exhibit altogether, but should have allowed the party an opportunity to file it, after due notice, on payment of costs. *Couture & Foster.* M. Judgment confirming, 6 March, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier. Cross, JJ. Rep. 5 Leg. News 302.

§ 13. *Faux.*—On motion and by consent of both parties *acte argué de faux* ordered to be sent to Privy Council. *Panet & Hamel.* Judgment, 3 June. 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

§ 14. *Défense en fait.—Intervention. —Acceptation of legacy.*—La partie qui

oppose une défense au fonds en fait à une demande en reprise d'instance, sans se plaindre qu'il n'y a pas eu de jugement sur une demande précédente en reprise d'instance non contestée, ne peut pas se prévaloir de cette irrégularité en Cour d'Appel;

La partie qui assigne des exécuteurs testamentaires en reprise d'instance, et produit le testament qui les nomme exécuteurs, n'est pas obligée de prouver qu'ils ont accepté cette charge, s'ils n'ont opposé à la demande qu'une défense au fonds en fait, sans nier spécialement qu'ils l'aient acceptée. *Price et al & Hale et al.* Q. Judgment confirming, 7 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 233.

§ 15. *Inscription.*—A case being inscribed for hearing on a preliminary plea, bad as not being a preliminary, and therefore dismissed, does not authorize the Court to dismiss the action without an inscription for hearing on the merits. *Danjon & Théberge.* Q. Judgment reversing, 7 October, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

§ 16. *Enquête.*—The regular mode of taking evidence, unless there be a consent in writing, is in presence of a judge. And a party can refuse to proceed where there is no judge. And if Defendant be summoned to appear where there is no judge, and he does not appear, he will not be held to be in contempt, if it be established that he knew there was no judge in the district, and therefore did not obey the *subpœna.* Nor will be charged with the costs of the day. And leave to appeal will not be granted from a judgment so deciding. *Pacaud & Poisson.* Q. Judgment 6 Dec., 1873. Duval, C. J., Badgley, Monk, Taschereau, Ramsay, JJ.

It is only by consent that a party in a contested suit can proceed to take evidence at length, and either party has a right to insist that the case be proceeded with at *enquête and merits. The Exchange Bank & Craig.* M. Judgment refusing leave to appeal, 27 March, 1884. Sir A. A. Dorion, C. J., Monk, J., dis. Rep. 7 Leg. News 390.

An *enquête* will be ordered in appeal to enable respondent to prove acquiescence in a judgment. *Jordan & Jetté,* M. Judgment September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a petition has been filed praying the dismissal of an appeal on the ground of *acquiescement,* and affidavits are filed in support and against the application of a contradictory character, leave will be granted to cross-examine the deponents. *Hotte & Champagne,* M. Judgment, 19 Nov. 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 25 J. 227, 2 Dec. d'A. 127.

Where in an action of damages for libel, the plea being in mitigation, is vague, the Defendant will not be given leave to re-open his *enquête* to examine witnesses not named, and whose evidence is described as "*tendant à prouver la vérité de tous les faits allégués dans l'article incriminé en cette cause à peu de chose près, etc.*" *Irvine & Tousignant,* Q. Judgment refusing leave to appeal 4 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

§ 17. *Evidence.*—When the presiding judge rules out evidence and the *enquête* is declared closed, and afterwards, correcting his own ruling, decides that the evidence is admissible and that it should not have been ruled out, the *enquête* should be re-opened generally. *Langlois & Valin.* Q. Judgment reversing, 8 June 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby JJ.

§ 18. *Faits et articles.*—Where a party neglect to answer *faits et articles* and makes application to the Court to have his default taken off, and thus the *faits et articles* are taken as confessed, is reversed by the Court, and judgment is given entirely on the evidence so obtained, the Court of Appeal will reverse the judgment but will condemn the party so in default to pay the costs of the appeal. *McGreevey & Gagné.*

Judgment reversing, 4 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. dis. as to the costs in Appeal, the Respondent being wholely in the wrong on that incident.

Incidental demand.—A set off against a demand is not always necessarily pleaded by an incidental demand. So an exception setting up that certain work was not performed according to the conditions of the contract was maintained. ***Muldoon & Lacroix et al.*** M. Judgment reversing, Dec. 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

§ 19. *In forma pauperis.*—If a party establishes under oath that he does not possess sufficient means to make the necessary disbursements, the court or a judge, upon being satisfied by affidavit that such party has a good cause of action or a good defence, may grant him leave to plead *in forma pauperis*, and may order all officers of justice to afford him their services without any remuneration; but such party, if he fails in the suit is not exempt from condemnation to pay costs to the other party. 31 C. C. P.

Where a defendant petitioned to be released from capias, and the petition was rejected, *held*, that he could not appeal from such judgment *in forma pauperis*. ***Canadian Bank of Commerce & Brown.*** M. Judgment, 12 Dec. 1874. Dorion, C. J., Monk. Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 110.

Legault & Legault 16 L. C. R. 163, Q. B. 1886.

§ 20. *Intervention.—Contestation of.*—Nonobstant l'article 158 du C. P. C., une partie peut contester une intervention après les huit jours qui suivent sa signification, s'il ne lui a pas été fait de demande de plaidoyer, et si aucun acte de forclusion n'a été accordé par le protonotaire. ***Derome et Robitaille et al.*** Q. Judgment reversing, 3 Dec. 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 8 Q. L. R. 60.

An intervention cannot be filed without leave of the Court or judge seized with a case when it is *en délibéré*. ***Holmes & Carter.*** M. Judgment confirming, 21 Sep. 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 50. 9 Rev. Leg 620.

§ 21. *Execution, Saisie sur Saisie.*—The provisions contained in art. 642 C.C. P. are applicable only to cases wherein the second or subsequent writ of execution against the lands of a debtor is placed in the sheriff's hands, while he is still in possession of the writ on which the said lands have been seized, and while he is still in position to proceed to the sale of such lands on the day fixed for the sale.

Accordingly, where an opposition has been filed to a seizure of lands, and the seizure has been suspended, and the sheriff has returned the writ and *procès-verbal* of seizure into the Prothonotary's office, a second seizure of the same lands may validly be made for another debt; and the sheriff is not required to note such subsequent writ of execution as an opposition for payment upon the first writ. ***Fuller et al. & Fletcher.*** M. Judgment reversing, 15 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 25 J. 93. 4 Leg. News 96. 1 Dec. d'A. 102.

§ 22. *Quo Warranto—Fiat of judge—Return day*—This was a proceeding under art. 1016 C. C. P. The following art. (1017) provides that the formalities set forth in article 998 shall he followed. That article says that the summons must be preceded by the authorisation of the court of judge. Art. 999, provides that the summons shall contain a command to the party complained of to appear *on a day fixed by the court or judge.*

Held that the failure by the court or judge to fix a day, was not a nullity, but that the party who had obtained the order might fix any day he liked. ***Ross & Fafard.*** Q. Judgment reversing, 4 Dec., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Monk, Ramsay, JJ., dissenting, thought that being a prohibition to do, except in a special way, evidently being to

give a protection against an extraordinary proceeding, it was a *nullité d'ordonnance* and purpose peremptory.

§ 23. *Sequestrator.* — The Court of Queen's Bench sitting in appeal has jurisdiction to grant leave to appeal from an order of a Judge in Chambers, where the judge is given the jurisdiction of the court.

A judgment appointing a sequestrator is a final judgment, and may be appealed from *de plano*. *McCracken & Logue.* M. Judgment confirming, 24 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. The Chief Justice, dis. Rep. 6 Leg. News 326. 3 Dec. d'A. 268.

§ 24. *Collocation.*—A report or judgment of collocation and distribution which has been homologated, without contestation, on motion made on the seventh day after its deposit and posting, *nisi causa*, five days after, will be set aside and annulled as having been irregularly and illegally homologated. *Villeneuve & Rolland.* M. Judgment reversing, 18 Sep. 1878. Rep. 23 J. 220.

§ 25. *Nullité de décret.*—The nullity of a sale in fraud of creditors may be invoked and pleaded by any creditor who was not a party to such fraudulent contract, in any proceeding in which the sale is set up against him by a fraudulent holder of the property sold.

Where a deed under the circumstances above stated is attacked by a creditor not a party to the deed, and who does not ask to be declared proprietor of the property alienated, it is not necessary to call into the cause all the parties to the alleged fraudulent deed. *Kane & Racine.* M. Judgment reversing, 3 Feb., 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J.. dis. Rep. 24 J. 216. 3 Leg. News 66.

It is not to adjudicate upon what is not demanded to accord to the plaintiff one undivided third of a usufruit of which by his action he demanded the whole. *DeBonald & Dame Marie Louise Barbier et al.*. M. Judgment confirming, 23 Jan., 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Where of the matters pleaded the parties consent that one issue alone should be submitted to the Court below, the Court of Appeals will only adjudicate on the case subject to such limitation. So where the Plaintiff makes answer, of *chose jugée* to all the pretentions of the Defendant in avoidance of the action, and the parties enter into the following agreement: "Les parties "en cette cause se désistent de l'ins- "cription de cette cause sur le rôle "d'enquête et mérite, et consentent à "inscrire la cause sur le rôle de droit, "pour audition en droit, sur la réplique "en droit du Défendeur, voulant et dé- "clarant les dites parties, que juge- "ment soit rendu en faveur de la de- "manderesse dans le cas où la dite "réponse en droit serait renvoyée sur "le mérite de son plaidoyer *rei indica-* "*tæ*, chose jugée, et qu'il serait déclaré "qu'il y a chose jugée entre les parties, "sur les moyens de défense du Défen- "deur," the Court of Appeals wil not look at any other issue. *Gareau & Desève.* M. Judgment confirming 3 Feb. 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

§ 26. *Pleading*—Where an action is brought for a specific sum of money being the results of a joint adventure, and there are no conclusions to account, and the Defendant in effect does account, the Court will examine the *débat de compte* and give judgment on the issue thus irregularly presented. *Brewster & Lamb.* M. Judgment reversing as to amount of the condemnation in the S. C. 22 Dec., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The non registration of the appointment of Plaintiff must be specially pleaded where the registration is alleged. *Poissant & Barrette.* M. Judgment confirming, 17 Dec., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News, 12.

Where a non-suit was entered owing to the absence of the Plaintiff's attor-

nies who owing to a misunderstanding were not present when the case was called, the Court in *banc* may relieve the party from the effects of the non-suit. *Bain & White.* M. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

The lease ran from 1st May, 1879, to 1st May, 1880; *held*, an action instituted 1st May, 1880, was premature, the last day of the term belonging wholly to the debtor.

To the principal demand in ejectment an incidental demand for damages (for illegally remaining in possession after 1st May) was subsequently added, and the Defendant pleaded to the incidental demand, asserting his right to remain in possession. *Held*, that although the principal demand was premature and inadmissible, and the incidental demand contained no conclusion for ejectment, yet the incidental demand might under the issued joined, be treated as if it were incorporated in the principal action so as to sustain a judgment of expulsion. *Donaldson & Charles.* M. Judgment confirming, 17 Nov., 1880. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 35. 1 Dec. d'Ap. 22.

Where in a matter of procedure a party can still have his remedy in the Superior Court, the Court of appeals will not grant leave to appeal. *Arless & Hall.* Q. Judgment Sep., 1878.

Motion by Respondent to reject the Appeal, it being an appeal from two judgment in two oppositions in the same case. Motion rejected as it did not appear that the Respondent was in any way injured by there being one appeal instead of two. *Dionne & Ross.* Q. Judgment, 6 Sep. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 299.

NOTE.—Another motion was also made to dismiss appeal because no reasons of Appeal filed. Rejected on principle of art. 1134 C. C. P. (1)

(1) If however there are demurrers to the proceeding to appeal or error the demand of reasons cannot be made before the judgment upon the demurrers.

Unimportant irregularities of procedure are covered by acquiescence of the opposite party. *Devlin & Ross et al.* Judgment confirming, 8 Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where it appears in appeal that justice cannot be done on the record as it stands owing to some omission or irregularity the case may be sent back to the Court below for the proceedings. *Beattie & Workman*, M. Judgment reversing, 26 February, 1884. Monk, Ramsay, Cross, Baby, JJ. Cross, J. dis.

§ 27. *Service at the Prothonotary's office.*—Service on the Defendant at the office of the Prothonotary is sufficient in matters of garnishment, if the Defendant has been sued as an absentee (615 C. C. P.)

Irregularities of procedure are readily covered by acquiescence where the party complaining has suffered no real injury. *Santoire et al. & Turcot.* M. Judgment reversing, 16 March, 1877 Monk, Ramsay, Sanborn, Tessier JJ.

Irregularities of procedure not complained of in Review will be taken as having been acquiesced in by the Appellant. *Scroggy & Gordon.* M. Judgment confirming, 16 Sep., 1879. Dorion, Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 348.

The Court of Appeals will not disturb a judgment on trifling irregularities of procedure, where no substantial injustice has been done. *Guy et al. & Gervais et al.* M. Judgment confirming, 22 Dec. 1879. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ.

The death of a Respondent who has not appeared on the appeal does not interrupt the proceedings between the Appellant and the Respondent who has appeared. *Hus & Millette & al.* M. Judgment, 21 June, 1879. Dorion, C.

J., Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 229.

§ 28. *Appeal to Privy Council.—Security.*—Where an application to appeal to the Privy Council has been made in Chambers five days after the judgment, security has been allowed to be given *de bene esse*, and the respondent moves in the next term that the record should be remitted to the Court below, the motion will be rejected. *Brewster & Lamb.* M. Judgment 22 March, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 25 J., 210. 3 Leg. News 109. See for order in chambers, 3 Leg. News 75.

In an action on a promissory note for value received the defendant will not be allowed, on motion, to delay to plead until the holder has given particulars of the debt for which the note was given. *Hall & The Union Bank of Lower Canada.* Q. Judgment confirming, 6 May, 1886. Sir A. A. Dorion, C. J. Ramsay, Tessier, Cross, Baby, JJ. Rep. 9 Leg. News 297.

Osborn & Sons sued W. F. Lewis & Co. for $462.10 for goods sold and delivered. Defendants admitted the debt but said it was compensated by a suretyship which Osborn has undertaken towards Wilkins & Co. to protect the draft of one Rogers, if he did not pay "on production of his (Rogers) promissory note, and the delivery to us (Osborn & Sons) of his composition notes, when received." Osborn & Sons do not deny their guarantee of Rogers, but by special answer they say if Lewis & Co. or Wilkins & Co. we have another set off against Wilkins & Co. *Held*, that this special answer does not alter the action of Osborn & Sons, it only avoids the exception of Lewis & Co. *Lewis et al & Osborn & Sons.* M. Judgment confirmed, 30 June 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Defendant filed two preliminary pleas. Plaintiff required his pleas to the merits, these Defendant filed one being a demurrer. Plaintiff then inscribed for hearing on the law issue. Defendant moved to reject this inscription. The motion was rejected and he moved to appeal. Leave to appeal was refused. *Barry & The Canadian Pacific.* M. Judgment, 30 June, 1886. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Ramsay, J., dissenting thought the law issue could not be heard before the preliminary pleas. The demurrer is not specially provided for by articles 131 and 132 C. C. P.; but the intention of the code was to have all the issues heard together. And that it was not intended to force the Defendant to argue the law issue before the preliminary pleas were heard.

Plea good in part cannot be all dismissed on demurrer to the whole. *Desrosiers & Hutchins.* M. Judgment reversing, 21 Sep., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where the Plaintiff by special answer raises new matter tending to alter the cause of action, and the Defendant joins issue without objection, the Court will not reject evidence as to the new matter. *Levasseur et al & Scott.* Q. Judgment confirming, 5 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

§ 29. *Assessment.*—The action was to recover back a special assessment for the widening of a street in the neighbourhood of Defendant's property and damages. The allegation was that the commissioners had no authority by law to make the assessment roll; but it was not stated particularly in what respect it was illegal, or in what the defect of the Commissioner's authority consisted. The parties joined issue on the declaration alleging that the Plaintiff had settled voluntarily with the Defendant. The Plaintiff's evidence was the answers of Defendant on *faits et articles* by which it appeared that the Commissioners had reported after their authority was at an end. In the Superior Court the action was dismissed on the ground that the action did not set forth the illegality complained of. *Held*, reversing the said judgment, that the action was not sufficiently explicit, but that this should

have been raised by an exception *à la forme*. M. Judgment reversing, 22 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dis.

Where, in a declaration, a right of action is set forth, although indistinctly, the action will not be dismissed on demurrer. *Whitman & The Corporation of Stanbridge*. M. Judgment reversing, 18 September, 1878. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ., 23 J. 176. 1 Leg. News 474 and 507. 9 Rev. Leg. 652.

An incidental demand is not necessary unless it raises new matter,—so where a person in possession of logs resists a *saisie revendication* on the ground that he has a lien on the logs, he can set up the matter by plea. *Hall & Atkinson*, Q. Judgment confirming, 22 Dec. 1877. Dorion C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 1 Leg. News 51.

§ 30. *Congé-défaut*.—The Defendant is not obliged to give notice of motion applying for *congé-défaut* of an action not returned. *Filiatrault & Buvet*. Judgment confirming, Dec. 1878, Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

§ 31. *Litispendence*.—Taking out a new action after one which has not been returned, does not give rise to an exception of litispendence. *Cleveland et al. & Weigland*. Judgment confirming, M. 22 June 1878. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ.

The exception of litispendence can only be maintained when the parties are the same, when the matter is the same, and when the cause of action is identical.

To an action of *partage* of the property of the community existing between the Plaintiff in said action, and his deceased wife, in which the survivor declares his willingness on certain conditions, to deliver to the *nus-propriétaires*, parties to the action, certain property which his said wife had the use and enjoyment of, does not prevent the *nus-propriétaires* from instituting an action demanding possession of the property in the hands of the surviver. *DeBonald & Dame Marie-Louise Barbier, et al.* M. Judgment confirming, 23 Jan., 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

In an action of damages for slander a plea of justification, and not in mitigation of damages, will be rejected on demurrer. *Moquin & Brossard*. M. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A Plaintiff having a right to a trial by jury, who has not declared by his declaration that he choses his case to be tried by a jury, may make his option after plea filed, and before completing the issue, notwithstanding the 64th rule of Practice. *Mason & Gebhardt*. M. Judgment reversing, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A case may be inscribed for *enquête et mérites*, without the filing of articulations of facts and answers, when the delay for filing the same had expired before the date of the inscription. *Bellay & Guay*. Q. Judgment, 1 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. 4 Q. L. R. 91.

§ 32. *Consolidation of causes*.—A suit instituted under the Lessors and Lessee's Act may be united with a cause proceeding between the parties under the ordinary jurisdiction of the Superior Court, in which the same question is involved. *Chrétien & Crowley*. M. Judgment confirming, 19 Jan. 1882. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. 5 Leg. News 268. 2 Dec. d'A. 385.

Remitting cases.—Subsequent separation.—Chrétien & Crowley. 1 Dec. d'A. 391.

Where no delay is fixed by the contract for the performance of an alternative obligation, the debtor can only be deprived of his option by the expi-

ration of a delay fixed by a judgment against him; and therefore, where the amount of a municipal corporation's subscription to a railway company was payable either in debentures or money, the corporation could not, by a mere notarial protest served on it, fixing a time for the delivery of the debentures, be deprived of its option to pay in debentures, and the action against the corporation should have given the alternative. *La Compagnie du chemin de fer des Laurentides et la Corporation de la paroisse de St. Lin.* M. Judgment confirming, 20 Dec., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis. was of opinion the action should have been maintained, as money is not an alternative, but the legal valuation of every obligation. Rep. 24 J. 191, 3 Leg. News 34.

A judgment to account within thirty days does not become executory *de plano* by the lapse of the thirty days. *Le Curé, etc. de Beauharnois & Robillard.* Judgment confirming, 21 June. 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk & Tessier, JJ., dis. Rep. 2 Leg. News 236.

§ 33 *Peremption.*—Where the motion to substitute an attorney, is filed in the Prothonotary's office, with the consent of the previous attorney, and nothing further is done and the time for peremption has expired, notice to the attorney substituted for peremption of the *instance* is sufficient. *Aubry & Prentice.* M. Judgment, 28 Jan., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

§ 34 *Re-opening enquête.*—In appeal the record will not be sent back to allow Defendant to re-open the enquete unless the rights he sues to protect are actually in jeopardy. *Paré & Héneault.* Q. Judgment confirming, 8 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The gardien who has not signed the *procès-verbal*, or whose non-signature is not recorded according to article 560 C. C. P. § 5, cannot be held liable *par corps* for not producing the goods seized. *Hamel & Marchildon.* Judgment reversing, 8 March, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 245.

§ 35. *Delays.*—Neither the day of service nor the terminal day is counted in the delays fixed for summoning. Delays continue to run upon Sundays and holidays; but if a delay expires on a holiday, it is of right extended to the next following day. The same rule applies to all other delays in procedure. Art. 24 C. C. P.

That in computation of time no fractions of a day be allowed nor shall any Sunday or binding holiday (*fête d'obligation*) be reckoned, unless otherwise provided for by law. Rules of Practice, S. C. 17 Dec. 1850. Art. XI.

The art. of C. C. P. and the rule of practice conflict, and the judgment being clearly wrong, judgment was suspended in order to give respondent time to desist. *Paston & Preston.* M. 14 June, 1877.

Delay to file reasons of appeal runs while the case is *en délibéré* on a motion to quash the appeal, and a foreclosure, when the time has occurred, will be held as good. But the respondent was allowed to file his reasons and a *factum*, a day being fixed for hearing. *Phillips & Sutherlands.* M. Judgment, 16 Feb., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 138.

A judge of the Court of Queen's Bench has power in Chambers to extend the delay for giving security on an appeal to the Privy Council beyond the delay ordered by the Court, as that within which security must be given, whenever he is seized of the matter prior to the expiration of such delay; and on security being given within such extended delay, the Respondents are estopped from executing the judgment appealed from. *The Mayor &c. of Montreal & Hubert et al.* Judgment, 21 March, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 85.

An opposition to a seizure and sale on a *venditioni exponas* will be dismissed if it be filed *de plano* and without a judge's order. *Delinelle & Armstrong et al.* M. Judgment confirming, 15 May, 1879. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 2 Leg. News 172.

Lorsque le greffier ou le prothonotaire reçoit des plaidoyers ou autres documents sans que le coût de leur production soit payé en entier ou ne le soit pas du tout, il est tenu d'en faire de suite l'entrée au plumitif et ne pas attendre qu'ils soient entièrement payés.

Lorsqu'un retrait est filé dans une cause, la Cour n'accordera pas une motion demandant à le retirer.

La Cour, malgré une motion pour retirer un retrait en donnera acte, sur motion à la partie en faveur de laquelle le dit retraxit a été filé. *Lespérance et al. vs. Lespérance.* M. Judgment confirming, 7 May, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ., dis. Rep. 13 Rev. Leg. 370.

§ 36. *Appeal.*—The Court will not grant leave to appeal from an Interlocutory order of a judge in Chambers authorizing the opening of the door of an insolvent. *Whitlock & Tyre*, M. Judgment. Sep. 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal will be granted from a Judgment dismissing an *exception à la forme. Nadeau & Baby et al.*, Q. Judgment, 5 Dec., 1874. Dorion C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal will be refused from judgment dismissing a *défense en droit. Daigneault & Perrault*, M. Judgment March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. *Hall & Turcotte*, Q. Judgment 1 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Leave to appeal will be refused from a judgment of *preuve avant faire droit. Jobin & Barbeau*, Q. Judgment 5 Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An appeal will not be allowed on a question of costs alone. *Crosbie & Blacklock*, M. Judgment confirming 27 January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Leave to appeal will not generally be granted on a question purely of costs, nor on mere matters of procedure, nor where the party has appeared to acquiesce by taking subsequent proceedings. *Hart & The Northern Ass. Co.*, M. Judgment 1874.

Leave to appeal will not be granted from a judgment on a mere matter of procedure. *Phillips & Choquette.* M. Judgment, March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

PROCEDURE. — *v.* ADMISSION, JUDGMENT, JURY TRIAL, LESSOR AND LESSEE.

PROCES-VERBAL. — *v.* MUNICIPAL CASES.

PROGRESS ESTIMATES. — *v.* CONTRACT.

PROHIBITION.—Writs of prohibition are addressed to Courts of inferior jurisdiction. They are applied for, obtained and executed in the same manner as writs of mandamus, and with the same formalities. 1031 C. C. P.

If there be no justice of the peace qualified to act, resident in the municipality where the penalty is incurred, the proceedings will be stopped by prohibition. *La Corporation de St. Lazare & Aubé et al.* Q. Judgment reversing, 7 September, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Prohibition will lie to restrain proceedings by the council of the bar against one of its members. *O'Farrell & Brassard.* Q. Judgment reversing, 7 Dec. 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 31.

Prohibition will lie against the corporation of Montreal exercising a quasi-judicial power to collect cotisations by way of distress, after the cotisation has been declared to be illegal by the Courts; and damages may be claimed at the same time. The court will not interfere with a judgment allowing trifling damages, as for instance $12, although there be no evidence of actual damage. *The City of Montreal & Workman.* M. Judgment confirming, 21 Dec., 1878. Dorion, C. J., Monk, Ramsay, Cross, Routhier, JJ.

A writ of prohibition will lie to restrain a corporation from exercising a quasi-judicial power. *Morgan & Coté.* M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Dorion, C. J., Tessier, J. dis. Rep. 3 Leg. News 274.

A writ of prohibition will not lie to restrain an inferior tribunal unless it appears clearly that such court has no jurisdiction in the matter. *Bergevin & Rouleau et al.*. M. Judgment confirming, 21 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 179.

Prohibition will not lie to correct a bad judgment or a simple excess of jurisdiction. It is the remedy where a court arrogates to itself jurisdiction it has not. *Simard & The Corporation of the County of Montmorency.* Q. Judgment confirming, 7 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 8 Leg. News 546.

Writ of prohibition does not lie where no excess of jurisdiction appears on the face of the proceedings. *The Mayor of Sorel & Armstrong.* M. Judgment reversing, 21 December, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Ramsay, Sanborn, JJ. dissenting from the judgment, but not from the general principle in the above holding. Ramsay, J., said: "I assent most willingly to the proposition that generally an erroneous judgment does not lay a court open to prohibition, but it is quite different where, as in this case, the right and the jurisdiction depend entirely on the absence of *error*." Rep. 20 J. 171, 2.

Writ of prohibition refused because the petition contained words injurious to the judge to whom it was presented. On appeal the judgment was confirmed *Champagne & Bélanger et al.* Q. 8 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 328.

NOTE.—The application for a writ of prohibition was unfounded on the merits.

Prohibition will not be declared absolute where under the licence act of Quebec the prosecution was begun before the Judge of Sessions by the Inspector of licenses in the name of Her Majesty, instead of being in his own name; nor because the complainant sets up several infractions of the act, the amount of penalties, if all were demanded exceeding $100, if the complainant has only asked for a condemnation for one penalty of $75. *Coté & Fortier.* Q. Judgment confirming, 8 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Writ of prohibition will be refused if the papers produced do not show the assumption of jurisdiction.

A motion to produce the necessary documents will not be granted. *L'Hero & Licri et al.* Q. Judgment confirming, 6 Dec. 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A writ of Prohibition may issue so long as there is any proceedings to prohibit. Prohibition will lie if it appears that the council of the bar has suspended an advocate from his functions without cause. *O'Farrell & The Bar of Quebec.* Q. Judgment reversing.

Where the conclusions are of a writ of injunction, and injunction is the proper remedy, its being called a writ of Prohibition is of no consequence under our system. *The Mayor of Iberville & Jones et al.* M. Judgment confirming, 22 June, 1880. Dorion, C. J.,

Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 277.

See what was said in *Morgan & Coté.* Rep. 3 Leg. News 274.

A magistrate is entitled to appear to contest the issue of a writ of Prohibition limiting his jurisdiction. *Pacaud & Hemming.* Q. Judgment confirming, 5 June, 1875.

The magistrate whose jurisdiction is attacked may appear in proceedings to prohibit him. *O'Farrell & Doucet.* Q. 3 Sep., 1878. Judgment refusing leave to appeal rejected. 4 Q. L. R. 207.

The prothonotary may issue a writ of prohibition under article 465 C. C. P.

If a district magistrate acting under 34 Vic., c. 2, (Q.) exercises the powers conferred upon him in an arbitrary and unjust manner, the Superior Court under its revisory powers over other Courts may restran him by prohibition. *Côté & Leclerc.* Q. Judgment confirming, 22 June, 1875.

Where the judgment of the Court of Review confirms that of the Superior Court maintaining a writ of prohibition, the magistrate defending his jurisdiction has not right of appeal, although he did not inscribe in Review, the inscription in Review being made by another Defendant. *Doucet & St. Amand.* Q. Judgment, 7 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 4 Q. L. R. 146.

Motion for leave to appeal from judgment in chambers refusing writ of prohibition refused.

PROMISE OF SALE.—*v.* SALE.

PROMISE TO PAY. — A promise to pay an account is a recognition of indebtedness and such recognition will not be set aside because Defendant, when sued, says he promised to pay to avoid a law suit. *Springle & Généreux.* M. Judgment confirming, September, 1876. Sir A. A. Dorion, C. J., Ramsay, Sanborn, Tessier, JJ.

PROMISSORY NOTE.—*v.* BILLS OF EXCHANGE.

The promissor and endorser of a note may prove as against the subsequent endorser that they drew and endorsed for the credit and benefit of the subsequent endorser. M. Judgment confirming, 26 February, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Prescription of a promissory note only runs from the expiration of the days of grace. *Laurent & Mercier.* M. Judgment confirming, 26 February 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Where a promissory note is surrendered to one of the Defendants, the presumption is, that it is paid, unless some other reason be established to prove why it was given to the Defendant. *McKenzie & Frizzell.* M. Judgment confirming, June, 1874. Taschereau, Ramsay Sanborn, Loranger, JJ.

The return of a note to the drawer is only a presumption of payment which may be destroyed by contrary evidence. In a commercial matter evidence may be by witnesses. *Grenier & Pothier.* Q. Judgment confirming, December, 1877. Sir A. A. Dorion, C. J., Monk. Ramsay, Tessier, Cross, JJ. Ramsay, J., dissident. On the ground that Plaintiff had failed to prove that the return of the note was not a remission of a debt. Rep. 1 Leg. News 33. 3 Q. L. R. 377.

PROPERTY.—Description of property to give jurisdiction over an absentee. *v.* ABSENTEE.

PROTHONOTARY.—The prothonotary is not liable in damages for the illegal issue of a writ of *saisie-arrêt* before judgment, unless it appears that he acted in bad faith, or without reasonable and probable cause. *McLennan et al. & Hubert et al.* M. Judgment confirming. 22 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Rep. 22 J. 294.

Record missing.—*v.* FLETCHER & THE MUTUAL FIRE INSURANCE CO. M. 22 March, 1879.

PUBLIC HEALTH is subject to the legislative powers of the local legislatures and the repeal of chapter 38 C. S. C. was beyond the powers of Parliament. *Binfret & Pope.* Q. Judgment confirming.

Toute législation sur la santé publique, dans chaque province, à l'exception des établissements des quarantaines et des hôpitaux de marine, tombe dans les attributions législatives de chaque province.

Le Parlement de la Puissance n'avait aucun pouvoir de rappeller les dispositions du ch. 38 des Statuts R. B. C., et que ces dispositions ne sont pas abrogées par le Statut du Canada de 1868, 31 V., ch. 63, s. 15, et qu'elles étaient encore en force le 4 septembre 1885, date de la proclamation du lieutenant-gouverneur.

PUBLIC OFFICER.—*Notice of action* —Notice of action before suit against a public officer, omitting to state where the act complained of was committed, or the residence of the Plaintiff's Attorneys, is sufficient. *Grant & Beaudry.* M. Judgment confirming, 18 Nov. 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 393. 2 Dec. d'A. 197.

PUBLIC ROAD.—A proprietor who, with the corporation of a city, has constructed a drain under the street to connect his property with the public sewer, has the exclusive ownership and possession of such drain; and the right of servitude thereby established in his favour entitles him to exercice the *action négatoire* to prevent others from using the drain. *Toupin & The Ontario Bank.* M. Judgment reversing, 21 Sep., 1877. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 20 J. 5.

PUBLIC WORKS.—A contractor for the construction of public works is liable personally for want of taking proper precautions to give notice of the perils created by such works. So where a schooner ran upon works in process of construction in the harbour of Quebec the contractor was held liable because there were no buoys. *Moore et al. & Paquet.* Q. Judgment confirming. 4 Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis. while agreeing to the general principle, thought that the works were visible, and as fully indicated as if there were buoys, that they were public works, the construction of which should have been known to navigators, and that therefore the damages were due to the want of skill and negligence of the captain of the schooner.

PUFFING AT AUCTION.—*v.* AUCTION.

Purchaser must except to the quality of articles delivered without delay. *Ostell & McLaren et al.* M. Judgment confirming, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ.

Q

QUALIFICATION OF MEMBER OF HOUSE OF ASSEMBLY.—Dans les actions pénales instituées en conformité aux séctions 125 et 130 de l'acte électoral de Québec, on doit appliquer dans la considération de la preuve les règles du strict droit.

Et la fraude ne se présume pas, mais doit nécessairement être prouvée. *Neault & St. Cyr.* Q. Judgment confirming, 5 June, 1877. Sir A. A. Dorion, C. J., Monk. Ramsay, Sanborn, Tessier, JJ. Rep. 3 Q. L. R. 147.

QUALIFICATION OF MEMBER OF LOCAL LEGISLATURE.—FALSE STATEMENT.—*v.* PENALTY.

QUI TAM. ACTION.—In the affidavit required by 27 and 28 Vic., Cap. 43, the cause of action must be indicated sufficiently to identify the action sworn to with that actually prosecuted as specified in the declaration. *Sipling & The Sparham Fireproof Roofing Co.* M. Judgment confirming, 19 Nov., 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. M. L. R. I. Q. B. 22.—*Reed & The Sparham Fireproof Roofing Co.* Rep. M. L. R. I. Q. B. 26. 7 Leg. News 390.

QUO WARRANTO.—*v.* PROCEDURE.

QUO WARRANTO—An illegal election of a school commissioner, where the person is elected and refuses to act, is a failure to elect, which gives the right to the Lieutenant-Governor in Council, to nominate to the vacant office, on the recommendation of the Minister of Public Instruction.

R

RADIATION D'HYPOTHEQUE.—*v.* REGISTRATION.

The registration of an hypothec cannot be cancelled on a *mandamus* against the registrar, without making the person who made the inscription a party to the proceeding. *Robert & Ryland.* M. Judgment confirming, March, 1877.

RAILWAY CASES.—The engagement by a railway company of a civil engineer, for carrying out the works of a railway, is a commercial contract and may be proved by parol. *Legge & The Laurentian Railway Co.* M. Judgment reversing, 17 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 98, 3 Leg. News 25.

Promoter.—Where a person worked for the interests of a railway company already in existence, by canvassing for stock, and assisted in the election of city councillors, who favoured granting aid to the company, without any stipulation that he should be paid for such services, he will have an action against the company for a *quantum meruit. The Montreal, Ottawa & Western Railway Co. & Berry.* M. Judgment reformed as to amount, otherwise confirmed, 14 Dec., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis. was of opinion that such services as the use of influence, in the absence of any contract to pay for them, could not be recovered,—that they were independant acts done in the party's own interest. Rep. 1 Leg. News 28.

Railway Companies subject to the provisions of the Act respecting Railways (C. S. C., cap. 66), are bound to carry all goods that are offered at any of their stations to any other station on their line of railway, unless some valid reason be assigned for refusing to do so. The Canadian Railway Act is compulsory and not permissive only. Under it Railway Companies are made common carriers, and it is not in their power to limit their obligations by a notice stating that they have ceased to carry any particular class of goods, without assigning a sufficient reason for such refusal. *Rutherford & The Grand Trunk Railway Company.* M. Judgment reversing, 17 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 20 J. 11.

A Railway Company is liable for the damage caused by its works although performed within the powers conferred on it by Statute. *La Corporation de Tingwick & The Grand Trunk Railway Co.* Q. March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 3 Q. L. R. III ; 9 Rev. Leg 346.

A Railway Company having obtained the right of running trains on another line is liable for damages for cattle killed by the negligence of those in charge of such train, although the damage occurs on the line not belonging to the Company Defendant. *Central Vermont Railroad Co. & Paquette.* M. Judgment confirming, Sep. 22, 1879. Rep. 2 Leg. News 390.

Injury causing death by passing train.—Contributory negligence.—Jury trial.—There is no contributory negligence on the part of a man killed by a passing train, of the approach of which he has had no notice. And where there are several grounds of alleged negligence, some of which are good others not, and there is evidence of negligence, the Court will not grant a new trial, where there has been a verdict for damages against the Railway Company, although it be thought that a verdict dismissing the action would have been sustainable. *The Grand Trunk Railway Co. & Godbout.*

Q. Judgment confirming, 8 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The obligation of every Railway Company being at its own costs and charges, to erect and maintain on each side of the line fences of the height and strength of an ordinary division and fence, with sliding gates, &c., with proper fastenings, and a company not having complied with the law in this respect, such company will be responsible for the loss occasioned by the killing of a horse on the line, in the absence of any special evidence as to how the horse got on the line. *The North Shore Railroad & Chateauneuf.* Q. Judgment confirming, 8th February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

Incidental damages. — The deed of sale of land for the right of passage does not cover incidental damages arising from the works of a railway, unless such damages are expressly mentioned in the deed. The limitation of six months in 32 Vic., cap. 51, sect. 21, does not apply to continuous damages, it is only from the time of the damages suffered. *Cantin & The North Shore Railroad Co.* Q. Judgment confirming, 6 Sep., 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

A way-bill by common carrier for goods may be transferred by endorsement, like a bill of lading.

Being so transferred, and the carrier being notified of the transfer, the goods can only be delivered to the holder.

The agent of a Railway Company in charge of one of its stations will be presumed to be authorized to give such way-bill styled "Shipping bill" in the form used, and the company will be bound by his acts in this respect. *The Grand Trunk Railway Co. & Shaw.* Judgment confirming that of Superior Court, Dec., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The railway of an incorporated company may be seized and sold, in execution of a judgment in favor of a mortgage creditor. *The Corporation of the County of Drummond & The South Eastern Railway Company.* M. Judgment reversing, 20 Dec., 1879. Rep. 24 J. 276, 3 Leg. News 2.

A portion of a railway cannot be seized in execution of a judgment unless it be for a debt for the security of which such portion of the road is specially hypothecated. *Stephen et al. & La Banque d'Hochelaga.* M. Judgment reversing, 21 September, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. *v.* 46 Vict., c. 24 as to seizure and sale of railways.

Under the Quebec Railway Act a Justice of the Peace has jurisdiction to entertain a complaint against a company for obstructing a highway.

The Dominion Railway Act has not the effect of abrogating the provisions of the Quebec Railway Act with respect to the local railways to which the Dominion Act applies. *Corporation of St. Joseph & Quebec Central Railway Co.* Q. Judgment reversing, 7 February, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11 Q. L. R. 193, 8 Leg. News 82. 14 Rev. Leg. 54.

A railway company is liable for the damage caused by its works, although performed within the powers conferred on it by statute. *La Corporation de Tingwick & The Grand Trunk Railway Co.* Q. 8 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 3 Q. L. R. 111, 9 Rev. Leg. 346.

A young woman took a passenger ticket on a railway from St. A. to St. J., at the latter place the "conductor" failed to notify her that the train had reached her stopping place. Immediately after the train started again, the passenger observed she was passing St. Johns, and threw herself out of the carriage and was injured. Her father sued the company in damages for these injuries. *Held*, reversing the judgment of the Court below, that the Company was only liable for the damages direct-

ly caused by the passenger being carried beyond St. J. (of which there was no evidence) but that the company was not liable for the damages resulting from her jumping off a train in motion. The fault was her own. It might have been otherwise had the passenger been invited to descend by an official of the company. Arts 1053, 1054, 1074, 1075, C. C. *The Central Vermont Railway Co. & Lareau.* M. Judgment reversing, 27 May, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. 9 Leg. News 365.

Held, incidentally, that under the law of this Province a father has an action of damages against the wrong-doer for the death of his child, caused by the fault of the Defendant. And it will be no answer to such action to say that the child was too young for his services to be of any value, and that he was only a source of expense to the parents at the time. *Lord & La Compagnie du Chemin de Fer du Nord.* Q. Judgment confirming, 5 February, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. eg. 297.

A line of railway running alongside of a street, and not divided by any fence from the street, is not a road on which foot passengers using it are entitled to the same protection as if they were walking on an ordinary highway. And so it was held that a person who was injured by falling over some planks lying on the track had no action against the company. *Faucher & The North Shore Railway Co.* Q. Judgment confirming, 5 February, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, J. dis. Rep. 9 Leg. News 75.

A railway company employed a number of labourers to work at the construction of the line of road, and promised them transport to the the place where they were to work. At a certain point the labourers were ordered to go on to a construction train. There were no carriages for their accommodation, but some trucks more or less encumbered with material. The greater number got on to a truck loaded with *lumber*, on which they were suffered to depart. Shortley afterwards a prop intended to keep the lumber in its place broke, and many of the labourers were precipitated to the ground and injured. *Held*, that the company was liable in damages. *The Canadian R. R. & Paquette.* M. Judgment confirming, 30 June, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Ross, Baby, JJ.

A railway company was permitted, by the act incorporating it, to pass its line through certain streets of the city of Quebec, with the consent of the corporation of Quebec, so as to guard the inhabitants thereof, and their property from injury, from the location or construction thereof, 16 Vic., c. 100, sect. 3. The municipal corporation granted leave to the railway company to pass their line in a street where respondent had property, to his great damage. Respondent sued the corporation for indemnity. *Held*, that the corporation was not liable. *Renaud & Corporation of Quebec.* Q. Judgment reversing, May, 1884.

Where works for the construction of a railway, authorized by statute, passing in the street of an incorporated town, injure the property of an individual, his action for damages will lie against the Municipal Corporation. *Lambert & The Corporation of Three Rivers.* Q. Judgment reversing, 5 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J. dissenting. Rep. 10 Rev. Leg. 359. Also *The Corporation of Three Rivers & Lessard*, decided same day. Rep. 10 Rev. Leg. 441.

RAPE.—*v.* CRIMINAL LAW.—RESERVED CASES.

REBELLION A JUSTICE.—A sequestrator was appointed and with a bailiff went to take possession. He was resisted by Appellants, and a rule for contrainte was taken. The facts having been established, the rule was made absolute. The Court of Appeals refused to interfere with a disciplinary order of this kind, unless the whole proceedings were null. *Doran and another & The*

Canada Gold Mining Co. Q. Judgment, 4 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby. JJ.

The Court of Queen's Bench has no revisory power, except by way of appeal, over the proceedings of the Superior Court, and it cannot, on an application for *habeas corpus*, examine into proceedings of the Superior Court in order to see whether a warrant committing a person to jail for *rébellion à la justice* in a civil suit, requires him to pay, in order to get his discharge, a sum greater than he was condemned to pay by a judgment of the Superior Court. *Ex parte Pollock*, Petitioner for Habeas Corpus. M. Judgment rejecting petition, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Sir A. A. Dorion, C. J. dissenting. Rep. 5 Leg. News 293, 2 Dec. d'A. 60.

RECEIPT.— *Subrogation.— Cove.*— A bank lent on a cove receipt covering a quantity of timber. Respondent took over the security and paid off the bank, agreeing to pay any balance that might be over in a certain way. The owner of the timber was in difficulties and became insolvent. The timber was seized by the Appellant, the cove-keepers in whose cove the timber lay, under a judgment obtained by them against the owner of the timber. *Held*, that the Respondent had a right to disinterest the bank and in good faith, and not knowing the insolvency of the owners, to undertake to dispose of the balance without fraud. And it did not signify whether the money by which the bank was disinterested passed through the hands of the owners or not.

Semble.— Property belonging to a Defendant may be seized in the hands of a third-party, if he does not object; and it may be seized in the possession of the Plaintiff. *Cook et al. & Fraser.* Q. Judgment confirming, 7 December, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Monk, Baby, JJ. dis.

May be set aside for error.— Price et al. & Mercier. Q. Judgment confirming, 7 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Ramsay, J. dis. agreeing in the general principle, thought the evidence in the particular case insufficient.

Parol testimony will be received to prove error in a receipt. *Ste. Marie & Ste. Marie.* M. Judgment confirming, 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Parol testimony is admissible to establish error in a receipt. *The Ætna Life Insurance Co. & Brodie.* M. Judgment reversing, 16 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 20 J. 286. 8 Rev. Leg. 91.

Where the terms of a receipt are clear, the party giving it will not be permitted to explain it by parol testimony, on the ground that the conditions of such a receipt appear to be unreasonable. *Giroux & Normandin.* M. Judgment confirming, 21 Dec., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Cross, JJ. dis.

A general receipt for "*toute réclamation*" covers a note in the hands of the party giving the receipt, and it is for him to show error if it be intended to exempt it. *Hart & Boudreault.* Q. Judgment confirming, 4 Sep., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Un reçu pour balance du prix de bois vendu constate un règlement final, qui ne peut être mis de côté, sans alléguer l'erreur ou d'autres causes de nullité. *Johnson & McGreevy.* Judgment confirming, 7 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 299.

Evidence to explain receipt.—The Respondent sued the Appellants for an alleged over paid amount of $135.38, his pretention being that he had paid the Appellants a sum of $1300.00 instead of that of $1144.62 which he owed them. He filed in Court several receipts amounting in all to $1300.

Held: That the Appellants had sufficiently established that on the 18th June, 1877, when they gave a receipt to Respondent for $500, they only received

a sum of $300, and, that this receipt included a previous payment of $200 made by one Rutherford on Respondent's account, consequently it was Respondent who still owed a balance to Appellant. *Keen et al. & Boon.* M. Judgment reversing, 25 Nov. 1882, Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Dec. d'A. 55.

The receipt of the Sheriff acknowledging having received money will not be set aside as given in error without a *commencement de preuve par écrit*, on the sole evidence of the officer who gave the receipt, where the amount acknowledged to have been received is the amount which the party paying it owed, and ought to have paid. Nor will this be affected by the question arising on an *inscription en faux* by the sheriff alleging having received the amount. *Larivière & The Corporation of Quebec.* Q. Judgment reversing, 8 Oct., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dis.

RECUSATION OF ASSIGNEE.—An assignee to an insolvent estate is not a judge within the meaning of article 176 of the Code of Civil Procedure, and therefore cannot be recused in the mode prescribed by the Code for the recusation of a judge.

Proceedings to disqualify an assignee under the Insolvent Act of 1869, must be taken in the mode prescribed by sect. 137 of the Act. *The Mechanics Bank & Brown.* M. Judgment confirming, 22 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 295.

REDHIBITORY.—*v.* VICE RHEDIBITOIRE.

REGISTRAR.—The registrar has no right to claim fees not allowed by the tarif.

There is no fee for the mention in the margin of every renewal of an hypothec, nor for any mention in the margin of any transfer, nor for any such mention in the registration of quittances, or radiation of hypothecs, article 13 of the tariff not applying to such items.

Nor has the registrar a right to charge for certificates which are not required by the party registering.

An action will lie for the recovery of such sums by the party by whom they were paid, whether the party so paying, intended to charge a principal or not. *Lachaine & Prevost.* M. Judgment confirming, 19 Nov., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Baby, JJ.

Liability of.—The registrar of each Registration Division is bound to enter in the certificate furnished by him to the Sheriff, under articles 699 and 700 of the Code of Civil Procedure, all hypothecs registered against the parties who have been owners of the property sold during the ten years preceding the sale, and he cannot limit his certificate to the entries of mortgages registered within such ten years, and that the registrar is liable to pay the amount of such mortgages as would have been collocated on the proceeds of the sale had he made a proper certificate, and which have not been so collocated owing to his not having furnished such a certificate, as the law called for. *The Trust and Loan Company & Dupras.* M. Judgment reversing, 17 September, 1880. Sir A. A. Dorion, C. J., Monk. Ramsay, Cross, JJ. Rep. 25 J. 239, 3 Leg. News 332.

REGISTRATION OF TITLE OF HEIRS.—Although art. 2098 of the C. C. obliges the heirs to register their title, the only penalty attached to their failure to do so is, that all conveyances, transfers or real rights granted by them are without effect. *Dallaire & Gravel.* M. Judgment reversing, 21 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 286. 2 Leg. News 15.

REGISTRATION.—Hodges sold land to Defendant Constant, 30th May, 1871. The vendor failed to enregister till the 30th June. On the 28th June, Constant gave an hypothec over land to Pacaud who enregistered the same day. Pa-

caud claimed to be entitled to rank on the proceeds of the land prior to the representatives of Hodges, but the Court held, confirming the judgment of the Superior Court, that Constant could not give any hypothec over the land till his own title was registered which was not on the 28th June (art. 2098 C. C.) *Pacaud & Aikman et al.* Judgment confirming, 4 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Since the Civil Code came into force, though a person may have acquired an immoveable in good faith, and be in open possession thereof as proprietor, yet, if the *acte* by which he acquired, though registered within thirty days, has not been registered until after the registration of a judicial or other *hypothèque* against the vendor, the latter claim attaches and has the preference.

The registration of a deed of alienation within thirty days from its date protects only the rights of the vendor or donor, and has no retroactive effect in favor of the person who acquires the property. *Adam & Flanders.* M. Judgment reversing, 22 December, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J. dis. Rep. 25 J. 25. 3 Leg. News 5.

The failure to register can only be invoked by third parties who have acquired real rights over real estate, and who have registered their titles, except in cases of fraud under the articles 2083, 2098, 230 C. C.

Article 2091 (1) only applies in case of seizure followed by expropriation. *Nightingale et La Société de Construction Canadienne.* M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The failure to register, except in a case of fraud, can only be invoked by third parties, who had or may have acquired real rights on the property, and who have the titles establishing their rights before the purchaser has registered his title. *Nightingale & La Société de Construction Jacques Cartier.* M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

An indication of payment, in favor of a creditor of a vendor of an immoveable, in a deed of sale duly registered, enures to the benefit of such creditor, who thereby becomes entitled to be collocated for the amount so indicated to be paid, on the proceeds arising from a judicial sale of such immoveable. *Longpré & Valade.* M. Judgment confirming. 17 Nov., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross. Baby, JJ. Cross, J., dis., Rep. 4 Leg. News 34, 1 Dec. d'A. 15.

Of donation.—Champagne & Chapdeleine. M. Judgment reversing, 21 December, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A deed of sale, revoked without fraud by the parties, confers no right on the creditor of the purchaser to permit him to seize the property. *Longpré et al. & Valade.* M. Judgment confirming, 17 Nov., 1880. Dorion, C. J., Monk, Ramsay, Cross, Baby. JJ. Cross, J., dis. Rep. 4 Leg. News 34, 1 Dec. d'A. 15.

Builder's privilege. — To allow the builder his privilege for the value added to the property (the plus value) there must be a *procès-verbal* of the state of the premises previously made, and the privilege only dates from the enregistration of the statement. *Robert et al. & Rieutord.* M. Judgment reversing, 26 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

Resolution of sale owing to failure to pay price. — A vendor prior to the coming into force of the Civil Code is not obliged to register specially his right to set aside the deed for failure to pay the price ; and inasmuch as it is a right of property dependent

(1) The same rule applies to the registration effected after the seizure of an immoveable when such seizure is followed by judicial expropriation.

on the law he is not obliged to renew the registration of the deed of sale. *Hart & Abbott.* Q. Judgment confirming, 4 Sep., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Under the 4th sec. of the Registry Ordinance enacts that nothing herein contained shall be construed to require the registration of the original grant, letters patent, conveyance or title by which lands have been granted and conveyed and are now held, *en fief, à titre de cens, en franc aleu* or in free and common soccage or of any rent, sum of money, due, duty or service, therein or thereby stipulated or reserved by the seignior, original grantor or lord of the fee.

The majority of the Court is therefore of opinion that original deeds of concession from the seignior or lord of the fee, constituting *rentes foncières*, do not require to be registered. *McCord & Les Religieuses Sœurs de l'Hôtel-Dieu de Montréal.* M. Judgment reversing, 17 Dec., 1879. Monk, Ramsay, Tessier, Cross, Routhier, JJ. Monk, Tessier, JJ., dis. Rep. 2 Leg. News 417.

To effect a composition with his creditors, James Baylis gave his notes endorsed by McKeand, who as security took an assignment of the estate, including a property in the City of Montreal. McKeand leased this property to the Appellants, James Baylis & Son, and subsequently reconveyed the property to James Baylis, with right to recover the rents accrued or to accrue. Subsequently the Respondent was appointed sequestrator to the property in a hypothecary action by Crossley & Sons against McKeand, and sued Appellant, to recover the rent from date of lease by McKeand to the date of his appointment.

The Court expressing strong doubts as to the propriety of the appointment of a sequestrator in such a case, and reversing the judgment of the Court below.

The transfer of rent by McKeand to Baylis did not require to be registered to enable Baylis to receive the rents.

The receipts *sous seing privé* given by Baylis to the Appellant, were *primâ facie* evidence that the rent had been paid at the date of the receipt and that it was for the Respondent to establish the contrary. *Baylis & Stanton.* M. Judgment reversing, 24 March, 1882, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 350.

Of substitution.—The renewal of registration of any real right, required by art. 2172 of the Civil Code, has reference only to hypothecs or charges on real property and not to rights in or to the property itself. *La Banque du Peuple & Laporte.* M. Judgment confirming, 21 Sep., 1874. Monk, Taschereau, Ramsay, Sanborn, JJ. Monk, Ramsay, JJ., dis. Rep. 19 J. 66.

Sub-division of lot. — By the 38 Vic., Q., c. 15, sec. 2 it is enacted: "In the case where a property before "the passing of this Act, has been sub-"divided and sold by lots, without "there previously having been a plan "and book of reference prepared "according to article 2175 of the Civil "Code, the Commissioner of Crown "Lands may, on requisition addressed "to him by a majority of the persons "interested, permit that a plan and "book of reference of the subdivision "of such property be made, *provided* "*that the following formalities be* "*observed*:

"1. A plan shall be made bearing "numbers as ordinary subdivisions; "also book of reference corresponding "therewith, which shall be signed and "certified as correct by the parties "interested, and addressed, with a "copy of such plan and book of refer-"ence, to the Commissioner of Crown "Lands, who shall keep the original, "and remit such copy certified by him "to the registrar of the registration "division;

"2. The registrar shall then prepare "his index to immoveables, for such "property thus cadastred, in his index "book for the subdivisions;

"3. On certificate of registrar of the

" deposit of the plan and book of " reference of such division thus made. " the Lieutenant-Governor in Council " shall issue a proclamation by which " he shall order that all the hypothecs " particularly affecting any of the lots " mentioned in the said plan and book " of reference, and not including the " hypothecs affecting the whole pro- " perty thus divided, be renewed with- " in a delay of six months, to be com- " puted from the day fixed in such " proclamation and in default of such " renewal being made, any person who " has not conformed to the provisions " of this section shall lose his rank of " priority of hypothec."

Held, that where the substantial requirements of the Statute have not been complied with, the proclamation of the Lieutenant-Governor, ordering the renewal of the hypothecs will not have the effect of compelling the hypothecary creditors to renew their inscriptions. *The Montreal Loan and Mortgage Co. & Boyer.* M. Judgment reversing, 26 May, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

v. DETENTEUR ACTUEL—DOUAIRE COUTUMIER.—EVIDENCE (3).—REGISTRAR.

Pour invoquer la priorité ou le défaut d'enregistrement des titres, suivant l'article 2098 du Code Civil, il faut que le titre provienne du même auteur ou du même vendeur ;

Dans l'espèce actuelle, la donation du père au fils a les caractères d'une donation à titre universel ;

Le possesseur qui invoque la prescription de dix ans, même celle de trente ans, ne peut valablement acquérir la prescription contre son titre ou contre celui de son auteur dont il est le successeur à titre universel. *Cloutier & Jacques.* Q. Judgment reversing, 8 February, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 10 Q. L. R. 44.

The registration of a deed of sale in which the immoveable sold is described by its cadastral number, and in which the purchaser undertakes to pay the amount of a hypothec duly registered before the proclamation of the Cadastre, will not supply the place of the renewal of registration of such hypothec required by C. C. 2172. *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal & La Société de Construction Canadienne de Montréal.* M. Judgment confirming, 27 March, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Leg. News 131.

By a deed of sale of the 3rd of April, 1843, which has never been registered, John McGuire sold the lot of land now possessed by the Appellant, reserving a right of passage in common on the lot sold in favour of the remainder of his property now possessed by Wiggins.

Held: That the right of way in favour of the Respondent was not extinguished by the fact that the deed of sale of the 3rd of April, 1843, was not registered, inasmuch as the Appellant and his auteurs have purchased subject to the servitude mentioned in the original deed. *Dunn & Wiggins.* M. Judgment confirming, 26 November, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Dec. d'A. 89.

Held: 1o. (Approving *La Banque du Peuple & Laporte*, 19 J. 66), that the renewal of registration of any real right, required by art. 2172 C. C., has no reference to a right in the property itself, such as a servitude or drain through a property, established by deed in favor of a neighbouring property.

2o. The proprietor of the servient land can do nothing which tends to render the exercise of the servitude less convenient than it was at the date of its creation ; and so, where the owner of the servient land constructed a barn over the drain running through his land, and, in the opinion of the majority of the Court, it was proved that repairs to the drain were necessary, it was *held* that the person to whom the servitude was due was entitled to ask that the barn be demolished to a sufficient extent to permit repairs to the drain to be made whenever necessary.

3o. The action to enforce such servitude does not lie against a person who has ceased to be owner of the servient land before the action is instituted, but he may be condemned personally in damages if he participated in the act of obstruction. *Wheeler et al. & Black et al.* M. Judgment confirming, 27 November, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J., dissenting as to its being a *trouble* for the proprietor of the *héritage servant* to build over the drain. Rep. M. L. R. II Q. B. 139. 9 Leg. News 202.

RE-INSURANCE.—*v.* INSURANCE.

RELATIVES.—*v.* ARBITRATION.

RELIQUAT DE COMPTE.—*v.* ACCOUNT.

REMERE.—An action to get back property under a stipulation of *reméré* will not be maintained unless there be *offres réelles. Walker & Sheppard & Labelle* mis en cause.

A vendor who has reserved a *faculté de reméré*, must strictly conform to the conditions stipulated for its exercise.

Semble he need not be put *en demeure* to exercise it after the delay during which it is permitted to be exercised by the contract has expired. *Walker & Sheppard & Labelle.* Judgment.

RENUNCIATION. — *Of hypothecary rights.*—A married woman may validly renounce her priority of hypothec in favor of a third person who is lending money to her husband on the security of his real estate.

Such renunciation in favour of a third party does not deprive the wife of her rights against other mortgage creditors inferior in rank to herself. *La Société de Construction Montarville vs. Cousineau et vir.* M. Judgment confirming, 3 Feb., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 329.

RENEWAL OF REGISTRATION. — *v.* REGISTRATION.

RENT FOR USE AND OCCUPATION.—*Imputation of payments.—Tétu & Garneau et al.* Q. Judgment reversing, Sep., 1874 Dorion, C. J., Monk, Ramsay, Sanborn, Bossé, JJ.

Presumption of payment of. — *Resiliation of lease.* — *Payment of three terms.—Shortis & Martel.* Q. Judgment confirming, 7 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Privilege for.—Deals manufactured from saw-logs sent to a mill to be sawn are not subject to the landlord's privilege for rent, but come within the exceptions declared by art. 1622 of the Civil Code. (1) *Price et al. & Hall.* Q. Judgment reversing, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 2 Q. L. R. 88, 10 Rev. Leg. 120.

The *cessionnaire* of an annual *rente foncière* may by an opposition *à fin de charge*, in the name of the *cédant*, preserve his right to the rent or its equivalent. *Rodier & Laberge.* M. Judgment confirming, 26 Sep., 1883. Monk, Ramsay, Tessier, Cross, JJ.

RENUNCIATION TO DOWER. — *v.* DOWER.

REPORT OF DISTRIBUTION.—*Notice.* —*v.* OPPOSANT.

L'Appelant, opposant en première instance qui n'a pas été colloqué dans le rapport de distribution préparé en cette cause, demande la mise de côté du jugement homologuant ce rapport de distribution, parce qu'il n'a pas été notifié de la production au greffe du dit rapport par le protonotaire de la Cour Supérieure.

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(1) It includes also moveable effects belonging to third persons and being on the premises by their consent express or implied, but not if such moveable effects be only transiently or accidentally on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired or to an auctioneer to be sold.

Jugé:—Que l'Appelant n'avait pas le droit à un avis particulier, et que s'il voulait contester le rapport de distribution, il devait le faire dans les délais mentionnés à l'article 742 C. P. C. (1) *Prevost & Latreille.* M. Judgment confirming, 29 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 166.

A clerical error in the judgment of distribution corrected. *Houle & Shelland et al.* Q. Judgment, 8 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

REPRISE D'INSTANCE.—*v.* ADVISER.

The appointment of a judicial adviser does not necessitate a *reprise d'instance* because it does not change the status of the party. *Rolland & Michaud.* M. Judgment 2 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

REQUETE CIVILE.—The enumeration in the Code of Procedure of modes of setting aside a judgment is not exclusive, and a direct action may be brought for the purpose where the Plaintiff alleges that the judgment was fraudulently obtained, without his knowledge and without service on him of the writ of summons. *Kellond & Reed.* M. Judgment reversing, 20 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Rep. 18 J. 309.

A *requête civile*, which does not on its face come within the provisions of Act 505 of the Code of C. P., may be rejected on motion. *Macdougall et al. & The Union Navigation Co.* M. Judgment confirming, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 63.

Une requête civile sera renvoyée, s'il appert que les manœuvres frauduleuses dont le requérant se plaint n'auraient pu exercer, sur la décision du litige, une influence determinante. (Art. 505, C. P. C.)

L'épouse séparé de biens et défendeur ne peut être témoin du demandeur sur la contestation d'une opposition afin de distraire, faite par la femme du défendeur. (Art. 251 C. P. C.)

Lorsqu'une partie est mise en cause dans une requête civile, et qu'elle n'a aucun intérêt à contester cette requête civile et qu elle n'est mise en cause que parce qu'elle était partie dans la cause originaire, et que, cependant, elle conteste la requête civile, elle n'obtiendra pas de dépens sur sa contestation, même si elle est maintenue. *Brunelle et al. & Bergeron et al.* Q. Judgment confirming, 7 February, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 501.

RESERVED CASES.—The general sessions of the peace may reserve a case for the consideration of the Court of Appeal and Error. *The Queen v. Smith.* M. Judgment 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 223.

The Defendant who has not been bailed should be present at the hearing and judgment of the case reserved. *The Queen & Deery.* M. Judgment on reserved case, 18 Dec., 1874. Dorion, C. J., Monk, Taschereau. Ramsay, Sanborn, JJ. Rep. 26 J. 129

In a later case it was held, that on the hearing of a reserved case it is not necessary that the prisoner should be present, and he may be kept locked up in gaol to prevent his being present while his case is being argued. *The Queen v. Glass, The Queen v. Scott.* M. Judgment 15 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, Ramsay, JJ, dis. Rep. 21 J. 245, 1 Leg. News 212.

A question raised by motion in arrest of judgment is a question arising on the trial, and properly reserved. *The Queen v. Deery.* M. Judgment on reserved case, 18 Dec., 1874. Dorion, C. J., Monk.

(2) The parties are allowed eight days to contest the report of distribution reckoning from the day on which it was entered on the posted list, if such a day be a Monday, if not the delay is reckoned from the Monday following.

Taschereau, Ramsay, Sanborn, JJ. Rep. 26 J. 129.

"Trial," within the meaning of C. S. L. C., c. 77, s. 57, is not terminated until sentence is rendered, and a "question which has arisen on the trial" does not necessarily mean a question that was raised at the trial, but one that took its rise at the trial; and therefore a point not mentioned by the defence may be reserved by the Court. *Reg. v. Bain*, M. Judgment, 22 June, 1877. Dorion, C. J. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 23 J. 327.

Where a case reserved mentioned a motion in arrest of judgment, and set forth the text of the reasons in support thereof, and reserved only the reasons, the Court, on the appeal side, would reject the motion, if it ought not to be maintained for any of the reasons therein contained, the jurisdiction of the Court for crown cases reserved being strictly limited to the point reserved. *The Queen & Deery.* M. Judgment on reserved case 18 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 26 J. 129.

The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the Defendant is alleged to have given false testimony, is not material where the assignment of perjury has no reference to the pleadings; but the Defendant, if he wishes, may in case the plea be not produced, prove its contents by secondary evidence.

It is not essential to prove that the facts sworn to by the Defendant, as alleged in the indictment, were material to the issue in the cause in which the Defendant was examined.

A reserved case may be amended at the request of the Defendant, during the argument thereon before the full Court, by adding the evidence taken at the trial.

Following *Reg. vs. Bain.* 23 L. C. J. 327). A new trial may be ordered on a reserved case, in misdemeanours, where it appears to the Court on the evidence that an injustice may have been done to the Defendant. *The Queen vs. John Ross.* M. Judgment reversing, 27 Sep., 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 227.

The prisoner was indicted for larceny, by a bailee, of a sum of money. The complainant produced a receipt, taken at the time of the deposit in the hands of prisoner, by which it appears the deposit was made "*en attendant le paiement qu'il pourrait faire d'une même somme à R. A. Benoit.*" *Held*, that this receipt implied that prisoner was to pay a similar sum, and not actually the same prices of money, and that there was no larceny. Also that parol testimony could not be admitted to vary the nature of the transaction. The prisoner was discharged. *The Queen & Berthiaume.* M. 25 September, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Baby, J. dis.

RESILIATION.—The lessor of a warehouse cannot obtain the resiliation of the lease, because there arises from the storage of goods, the smell which such articles generally produce. *Joseph & Kinghan.* M. Judgment confirming. Dorion, C. J., Monk, Taschereau, Sanborn, JJ. Ramsay, J., was absent at rendering judgment but concurred.

RESILIATION OF LEASE.—A lessee who makes no objection to the non-fulfilment of a condition of his lease within a specified time, till after the undertaking of the landlord is accomplished, and a term of the rent is due, cannot demand a resiliation of the lease owing to the non-fulfilment of the condition. *Ballantine & Snowdon.* M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ., and *v.* GAULT AND EVANS & EVANS & GAULT, Dec., 1874.

An action to resiliate a lease should be brought before the Superior Court or before the Circuit Court as the amount claimed by the action, for lease or for use and occupation or for dama-

ges is of the jurisdiction of the one or other of those Courts, and not according to the annual rent or value of the premises. *Voisard & Saunders.* M. Judgment reversing, 21 Dec., 1887. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Tessier, JJ. dis. Rep. 22 J. 43. 1 Leg. News 41.

A lease will be rescinded if the premises are not habitable. *Leville & O'Brien.* M. Judgment reversing, Dec., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Motion to reject appeal, the annual rent being $50. However there was a clause in the lease (which was for seven years) permiting Defendant to purchase the property any time during the lease for $1000. The judgment set aside the lease, and thus determined Defendant's right to purchase. The motion to reject the Appeal was rejected, the Court holding that a title to land was in question. *Cauchon & Anderson.* Q. Judgment, 1 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where the fire only partially destroys the premises leased, the lessee cannot oblige the landlord to terminate the lease. *Geriken & Pinsonneault.* M. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Dorion, C. J., Sanborn, J. is. were of opinion that the injury endered the house uninhabitable.

RESILIATION OF SIMULATED DEED. —A deed made merely as a cover for a loan to the nominal vendor, will be resiliated and set aside as simulated at the suit of a creditor whose rights are injured by such deed. And the fact that the nominal vendor has remained in possession of the property will be evidence of the nature of the transaction. *Thibaudeau & Mailley.* M. Judgment reversing, 25 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier and Baby, JJ. dis.

RESILIATION OF SALE FAUTE DE PAIEMENT DE PRIX.— *v.* SIMMONS & CROSS, June, 1875.

RES JUDICATA.—The grounds decided in a suit, cannot be raised between the same parties on opposition to the execution of the judgment. *Dawson & McDonald.* Q. Judgment confirming, 6 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A judgment declaring a will void as a *testament solennel* cannot be invoked as having adjudicated the question, not in issue in such suit, as to the validity of the will in the english form. *Marquis & Marquis.* Q. Judgment confirming, 4 March, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, Plamondon, JJ. Rep. 1 Q. L. R. 50.

Damages.—An action of damages will not lie against a party to a previous suit by his adversary, for an alleged false affidavit by which such party obtained a final judgment in his favor in the previous suit. The first judgment is *res judicata. Boisclair & Lalancette.* M. Judgment reversing, 15 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 5 Leg. News 266. Dec. d'A. 289.

A possessor of land in good faith, who has a *droit de retention* for improvements cannot bring a direct action after abandoning the land on suit for the value of the improvements. There is *chose jugée*, for the question was fully adjudicated upon by the Court whether Defendant had a right to retain the land. *Barbin et al. & Langlois.* Judgment confirming, 8 Sep., 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J. dis.

A judgment rendered on a confession made under an agreement not to execute such judgment, on certain conditions, does not constitute such a *res judicata* as will prevent the Defendant making an opposition to the execution, and the opposition may be maintained, if the admissions of the Plaintiff and contesting party establish the fact of the agreement. Q. Judgment reversing, Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Ramsay, J., dis. was of opinion that the admission prior to judgment could not be enquired of by any form

of evidence, that the judgment furnished a *presomptio juris et de jure*. v. 6 Savign, Droit Romain, p. 474, Tr. de Guenona.

A Defendant, after he has contested an account, and judgment has gone against him, will be permitted, on an opposition to the seizure under judgment, to prove a payment which he had failed to prove in the principal suit, owing to his having been in error as to the date when he made such payment. *Cornell & Richard.* M. Judgment confirming, 18 Sep., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dis. Rep. 1 Leg. News 471.

RESOLUTORY ACTION. — A building society being in difficulties went into liquidation. It was resolved to sell the assets at a meeting of the shareholders, it was determined by a unanimous vote, to accept the offer of one Moisan therefor, namely 88¼ cents in the $, Appellant was present at the meeting but did not vote. Subsequently he sued the liquidators and Moisan to set aside the sale, alleging fraud and that Moisan was only the *prête-nom* of two of the liquidators, Gauthier & Bourque, with whom he was acting in concert. It appears Appellant purchased from one Limoges, after the society went into insolvency, four shares for a very small sum, and that he gained largely by the transaction at the price the assets were sold, and that the transaction was a very favorable one for the shareholders. The principal point urged by Appellant was that the sale to two of the liquidators was a violation of art. 1484 C. C. (1) *Held*, confirming the judgment of the Superior Court, that the right of action of Appellant was not affected by the fact of the time or terms of the purchase of the shares from Limoges, that the liquidators, parties interested in securing a good price for the estate were not precluded by art. 1484, C. C. for tendering for the assets without fraud, and that no fraud had been proved. *Semble* that Belanger had acquiesced in the sale. *Bélanger & Gauthier et al.* M. Judgment confirming, 26 Sep., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

(1) The following persons cannot become buyers, either by themselves or by parties interposed, that is to say:—Tutors or curators of the property of those over whom they are appointed, except in sales by judicial authority. Agents of the property they are charged with the sale of administrators or trustees of the property in their charge whether of public bodies or of private persons,

RESOLUTORY CONDITION.—*v.* CHARTER PARTY.

RESPONSIBILITY.—Where a cargo of coals to arrive is sold, the risk of their non-arrival in a reasonable time is at the charge of the vendor. *Adams & Crawford*, Q. Judgment confirming, 5 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

RETAINER.—*v.* ADVOCATE'S FEES.

RETENTION.—*Right of, for improvements.*—Where a party to a petitory action has not claimed for improvements, and judgment goes for the Plaintiff, the Defendant will not have an independent action to set the judgment aside, or to be allowed to retain the property till the Plaintiff in the first action, has paid the Plaintiff the alleged improvements. Such an action may be dismissed on demurrer. *Barbin & Langlois*, Q. Judgment confirming, 8 Sept., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Droit de.—The right of retention, under art. 419 C. C., (1) is not established in favour of the particular legatee who has made improvements, and who is called upon to return the property he has so received by a creditor of the succession. His remedy is similar to that accorded by art. 2072 C. C. *Matte*

(1) In case the party in possession is forced to give up the immoveable upon which he has made improvements for which he is entitled to be reimbursed, he has a right to retain the property upon which such reimbursement is made, without prejudice to his personal recourse to obtain repayment, saving the case of surrender in a hypothecary action, which is specially provided for in the title of Privileges and Hypothecs.

& Laroche. Q. Judgment reversing, 8 June, 1878. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Q. L. R. 65.

NOTE.—Mr. Justice Tessier entered at some length into the question of *séparation de patrimoine*, but the question was not pleaded and the judgment did not turn upon this.

RETROACTIVITY.—An act of the Legislature of the Province of Quebec passed on 24 December, 1872, limited appeal in certain cases that had gone in review, although the proceedings in the suit had been commenced previous to that date, the act applies to cases inscribed for review subsequent to the enactment. *Stewart & Angers.* M. Judgment.

RETROACTIVITY.— *v.* APPEAL.— LEGISLATIVE POWERS.

RETRAXIT.—A party Plaintiff may abandon an item of his demand by *retraxit*, but not in such a manner as to alter the issues unfavourably to the Defendant. So where a Plaintiff sued on a balance of account for money lent, and for a balance for goods sold and delivered, and Defendant admitted to have received the goods and denied having received a large portion of the money said to be lent, and neither party made any proof and the Plaintiff filed a *retraxit* for the demand for money lent, and asked for judgment on the admission in the plea, the action will be dismissed. *Lassalle & Hart.* Q. Judgment reversing, 6 September, 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

RETRAIT SUCCESSORAL.— The *retrait successoral* in virtue of art. 710 C. C. may be exercised after family arrangement; and this although the purchaser, not being an heir, has purchased a determinate portion of certain immovables. *Durocher & Turgeon.* M. Judgment confirming, September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 178.

RETROACTIVE LEGISLATION.—The Act of Can. 45 Vic., cap. 127, confirming and ratifying all acts and doings of the Board of Temporalities, since the passing of the 38 Vict., cap. 64, was sufficient to sustain an action instituted by the Board before the passing of the 45 Vict., and the Dominion Parliament had authority to enact said statute, although the Privy Council in England had, by their judgment in Dobie and Temporalities, declared the Board to be illegally constituted. *The Minister and Trustees of St. Andrew's Church and the Board of Temporalities Church of Scotland.* M. Judgment confirming. M. 20 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ. Ramsay, J., dis. Rep. 6 Leg. News 27.

REVENDICATION.—Where the goods of the wife are seized for taxes due by the husband, she cannot proceed by way of saisie-revendication to attach such goods in the hands of the guardian. *Walker & The Mayor &c. of Sorel.* M. Judgment confirming, Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

On a sale of goods, without delay for the payment, the vendor may, within eight days of the delivery, revendicate them, in the hands of the purchaser, if the price be not paid *Blagdon & Lebel.* Q. Judgment confirming. Sep., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5 Q. L. R., 87.

A proprietor on whose land logs have been cut and carried to a place where they can be floated has a right to revendicate them on paying the price of the making and transportation of the logs, by which he profits. *Tourville et al. & Allard.* Q. Judgment reforming, 7 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, Baby, JJ., dis.

REVENDICATION BY GUARDIAN.— *v.* GARDIEN.

REVIEW.—Where the judgment of the Court of Review confirms that of the Superior Court, maintaining a writ of Prohibition, the magistrate Defending his jurisdiction has not right of

appeal, although he did not inscribe in Review, the inscription in Review being made by another Defendant. *Doucet & St. Amand.* Q. Judgment, 7 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 4 Q. L. R. 146.

REVOCATION.—A contract by which a husband transfers his property, then under seizure at the suit of his wife in an action *en séparation de biens*, to the hands of a trustee, in consideration of *main-levée* being granted of such seizure, such property to be held in trust till the action in separation of property is settled, cannot be set aside, after the *main levée* of the seizure, on the demand of the husband. M. Judgment reversing, 27 Jan., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, Ramsay, JJ., dis. being of opinion that the husband's consent in a matter of separation is null.

REVOCATORY ACTION. — A vendor of immoveables, (before the passing of the Code,) who has assigned portions of the purchase money, can, nevertheless, bring a resolutory action by reason of the default of the vendee to pay any portion of the purchase money, and that the intervention in such action by the assignees, containing a declaration of acquiescence in such action, places the Plaintiff's right of action beyond question. The sale of Government timber limits is a sale of an immoveable. *Watson & Perkins.* M. Judgment confirming, 20 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

Fraudulent sale. — A creditor who cannot obtain payment from his debtor, may bring a revocatory action to set aside the sale of the real estate of such debtor. And the transaction will be declared fraudulent where it appears by the evidence, that the price was not paid by the purchaser, although a full receipt was given therefor, but that the pretended purchaser had a counter-claim against the vendor, and who had applied the balance of the price in the purchase of a property in his own name. *Bruneau et al. & Bertrand.* M. Judgment confirming, 20 Sep., 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Action révocatoire for fraud.—Bruneau & Bertrand. M. Judgment, 20 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A revocatory action will lie to rescind a deed of sale, passed before the Code, of timber limits for non-payment of the price, at the suit of the assignee of the insolvent vendor, although part of the price may have been assigned to others, and although an hypothec has been created on the property of $5,000, more than four times the amount of purchase money remaining due.

That the sale of timber limits, *i. e.* the right to cut timber, is the sale of an immoveable. *Watson ès-qualité & Perkins et al.* Judgment confirming that of Superior Court, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Rep. 18 J. 261.

Action to rescind lease there being no privies.—Beaudry & Lupien. M. Judgment confirming, 23 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

RIVERS.—The 19 and 20 Vic., ch. 104, does not confer the right of a proprietor on one bank of a river, to rest a mill-dam on the opposite bank, belonging to another. *Bureau & Vachon.* Q. Judgment reversing. 7 December, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, J. dis.

Obstruction to.—Where the riparian proprietor of a *non navigable* river places a dam there which does not render the river less advantageous than it was naturally for *running logs*, a proprietor higher up the stream, or any one *driving wood* on such stream cannot complain. *McBean & Carlisle et al.* M. Judgment confirming, 22 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

That the public have a right to use all streams as highways, and a riparian proprietor cannot arrest the water from

such river or stream so as prevent this use. *McBean & Carlisle et al.* M. Judg. ment reversing, 21 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 276.

The use which riparian proprietors may have of the beach of a navigable river adjoining their lands, is not a right of property nor even a right of servitude, but a mere "*droit de tolérance*" which ceases, without right to indemnity, as soon as the Crown concedes or otherwise disposes of such part of the public domain.

Hence, where the legislature authorized a railway company to construct its line along the shore of a river, and the company, under the authority so conferred by the legislature, constructed its line along the beach between high and low water, and thereby deprived riparian proprietors of access to the river, to the great injury of the business previously established and carried on by them, it was held that an action of damages could not be maintained against the railway company by the persons who where so cut off from access to the river, the Crown having the right to authorize such construction, and no redress being provided by the statute. *La Cie du Chemin de Fer du Nord & Pion et al.* M. Judgment reversing, 4 February, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J. dis. Rep. 9 L. N. 218. 14 Rev. Leg. 177. 4 Dec. d'A. 358. 12 Q. L. R. 205.

Une compagnie de chemin de fer est en droit, lorsqu'elle en est autorisée par sa charte, de se servir, pour y construire son chemin de fer, de la grève comprise entre les hautes et basses marées.

Le fait de construire ainsi un tel chemin ne donne pas au propriétaire voisin, si la propriété de celui-ci n'a souffert aucun dommage matériel, le droit d'être indemnisé de la privation qui lui est faite de pouvoir désormais communiquer librement à la rivière et de se servir des eaux de la dite rivière pour les besoins de son industrie.

Cette faculté d'accès à la rivière n'est pas un avantage exclusif, mais au contraire, cette faculté peut être exercée par tous autres sujets de Sa Majesté, et que partout, elle ne confère aux propriétaires riverains que des avantages indirects, sans leur conférer un droit à une indemnité, pour la privation de tels avantages. *La Cie du Chemin de Fer du Nord & Pion et al.* Q. Judgment reversing, 4 February, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J. dis. Rep. 14 Rev. Leg. 177. 4 Dec. d'A. 358. 9 L. N. 218.

Celui dont la propriété borde une eau courante ne faisant pas partie du domaine public, peut utiliser et exploiter cette eau en y construisant une chaussée d'une hauteur suffisante pour faire marcher le moulin qu'il a construit sur sa propriété ; que le propriétaire d'un moulin supérieur auquel ces travaux nuisent en y faisant refluer les eaux, ne peut demander qu'une indemnité et n'a droit à la démolition des travaux qu'à défaut du paiement de l'indemnité. *Demers & Germain.* Q. Judgment confirming, 6 May, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 369, 9 Leg. News 305.

Il n'y a pas lieu à une action en complainte ou négatoire, au cas de l'écoulement naturel des eaux, mêmes augmentées en volume par la culture. d un héritage supérieur à un héritage inférieur.

Dans l'espèce actuelle il n'y a pas lieu à recours en dommages. *Faucher & Hall.* Q. Judgment confirming, 7 February, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Baby, J., dissenting. Rep. 11 Q. L. R. 15.

The *riverain* proprietor may recover damages against the owner of a raft for mooring his raft opposite the property of Plaintiff, and close to the shore, not being driven there by stress of weather or any necessity of navigation, and leaving it there so long as to create a nuisance. *Dunning & al & Girouard & al.* M. Judgment confirming, 16 March, 1877. Dorion, C. J., Monk, Ramsay,

Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 177.

A lumberman whose logs drift on to the land of a *riverain* proprietor is liable for the damages caused to the land, if he does not use due diligence in preventing the logs becoming stranded on the land, or, if that be impossible, if he does not use due diligence in removing them. ***Morneau & Atkinson.*** Q. Judgment reversing, 5 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Damages are due by persons lumbering who leave their logs on the low lands by the river-side and so cause injury to the proprietor. *Guilmoy & Methot.* Q. Judgment confirming, 4 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

Where the legislature authorizes works in a public river, and a person navigating such river runs upon these works and suffers damage, he cannot claim damages from the persons to whom the right to make such works is conceded.

But where the works to be made are to be such as will not obstruct the navigation, and in fact they do obstruct it, the *concessionnaires* will be liable.

And this liability will not cease, although by the terms of the act the plan to the works was to be submitted to the Governor, and was actually so submitted and sanctioned by him.

The loss of the use of his vessel, damaged by the accident, during the spring of the year, in the absence of any evidence of want of diligence in repairing it, is a good measure of damages. ***The Pierreville Steam Mill Co. & Martineau.*** M. Judgment confirming, 21 Dec., 1875. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Sicotte, J. dis. Rep. 20 J. 225.

ROADS—*Private improvements to a public Road.*—Les Appelants ayant, il y a nombre d'années, construit à leurs frais et pour l'alimentation de leur moulin un chemin *ponté* dans la paroisse de Ste. Geneviève, renouvelèrent le *pontage* à mesure qne le besoin s'en faisait sentir, permettant au public d'y passer. En 1880, ils firent l'acquisition d'une lisière de terre voisine, ouvrirent un chemin privé qu'ils fermèrent d'une barrière à chaque extrémité, enlevèrent les bons madriers qui se trouvaient sur l'ancien chemin pour les placer sur le nouveau, tout en jetant de côté les mauvais. L'Intimée poursuivit par une action possessoire concluant à la remise des madriers ou au paiement de $2506 de dommages et à ce qu'elle fut maintenue dans la possession du chemin. Le jugement de la Cour Inférieure a accepté les conclusions possessoires de l'action, mais refuse les dommages.

Jugé en appel: 1o. Que l'Intimée n'ayant pas produit de contre-appel, la Cour d'Appel ne peut se prononcer que sur le possessoire.

2o. Que le fait des Appelants d'enlever le *pontage*, lequel ne tenait, *ni à fer ni à clous*, et n'avait pas été mis là à *perpétuelle demeure*, n'a pas eu pour but d'enlever à l'Intimée la possession civile du chemin, et qu'en conséquence les conclusions possessoires auraient dû être refusées. *Price & The Corporation of Ste. Geneviève.* Q. Judgment reversing, 4 Feb., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby. JJ. Ramsay, J., dis. Rep. 8 Q. L. R. 67.

The Provincial Government, by an order in Council, transferred all the rights it had in a road situated in the municipality of St. Valier, and over the house and ground where the keeper of a toll-bridge lived. Independently of this order in Council the municipality could have claimed this road as a municipal high-way. The municipality did not need to produce an authorisation of the municipal council to sue. The attornies of the corporation are not disavowed. Q. Judgment confirming, 4 Dec., 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Dec. d'A. 147.

Municipality—its obligations.—The owner of a property through which the municipality opens a front road, at his

own cost, and that this rule applies to cases as well before as since the coming into force of the Municipal Code. *Whitman & The Corporation of the Township of Stanbridge.* M. Judgment confirming, 29 Nov., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dis. Rep. 26 J. 144. 4 Leg. News 406. 2 Dec. d'A. 112.

A municipality is liable for damages incurred by the bad state of a municipal road, although by the arrangements between the proprietors and the municipality, the former are bound to keep the road in order.

A man having drunk so as to be excited will not discharge the municipality of its liability for damages arising from the bad state of a municipal road, unless it can be shown that the condition of the Plaintiff was the cause of the accident. *Martin & The Corporation of the Township of Ascot.* M. Judgment reversing, 20 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 2 Leg. News 227.

A contractor having to use a road within the limits of the corporation respondent found the road out of repair. He notified the corporation to repair which they neglected to do. He then repaired a bridge which was in a dangerous state and sued the corporation for the expenditure and damages sustained by the bad repair of the road. The corporation demurred, and the demurrer was succesful in so far as regards the repairs of the bridge, the court noting, that the law gave a mode of compelling a corporation to repair its highways, and that a private person had no action for repairs. On the issue as to damages for the bad state of the road the parties went to trial and the court of first instance awarded substantial damages. The corporation took the case to Review and the Court of Review reversed the judgment awarding damages. The contractor then appealed from both judgments. The one dismissing the action for repairs, and the judgment as to the damages. The Court of Appeal maintained the judgment in Review. *Beaucaye & The Corporation of Deschambault.* Q. Judgment confirming, 7 October, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice & Ramsay, J., dissenting thought the judgment on the demurrer should be reversed; that in a case of absolute necessity, a private person was justified in repairing a high-road that was in a dangerous state, and if justified in so doing he might recover the cost from the municipality. They concurred with the majority of the court in thinking the damages complained of owing to the difficulty of carting too remote.

Where a county council declares a local road to be a county road merely for the purpose of abolishing it, the Court will interfere and overrule such abusive exercise of power. *Corporation du Comté d'Arthabaska & Patoine.* Q. Judgment confirming, 6 February, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Sir A. A. Dorion, C. J. dissenting. Rep. 12 Q. L. R. 57. 4 Dec. d'A. 364.

A by-road homologated as a charge on certain proprietors, without any special mention of the fences, afterwards adopted by the municipal council, and to be maintained at their charge, obliges the corporation to maintain the half of the fences with the proprietors through whose land it passes, if it is in a line, and the whole if it cuts a land. Arts. 535 and 775 M. C. *The Corporation of L'Avenir & Duguay.* Q. Judgment confirming, 7 October, 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Cross, J. dis. on a matter of detail. 9 Leg. News 346. 14 Rev. Leg. 570.

An action will lie against a municipal corporation for the bad state of a road under its control owing to railway works carried on under a statute, and the contractor may be called in as *garant. McGreevy & The Corporation of Three Rivers.* Q. Judgment confirming, 8 Sep. 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dissenting, thought the corporation was not liable, as was held in the cases of *Lambert & The Corporation of*

Three Rivers, and *Lessard* against the same corporation, and that therefore there was nothing to *garantir*. Secondly, that if the contractor was acting under the statute, and within its powers, the railway company and not he was liable, unless the contractor had agreed to pay the damages necessarily arising from the works, which did not appear to be the case.

A street Railway Company authorized by statute (24 Vict., ch. 84) to construct a track upon and along the highways in the parish of Montreal, leading into the streets of the City "and to use and occupy any and such "parts of any of the streets or high-"ways aforesaid as may be required "for the purpose of their railway track "and the laying of the rails and the "running of their cars and carriages," exceeds its powers by laying the track on one side of a highway, within six feet from the line of the adjoining property, the value of which was thereby greatly diminished. Where a right of passage is given it should be exercised *ex æquo et bono*, in accordance with the use and destination of the highway, so as to cause as little inconvenience as possible (compatible with the exercise of the privilege) to the public, and the adjoining proprietors. And, in the present case the track should have been constructed on the part of the highway used by vehicles, and not on one side thereof used by persons on foot, and where the running of the cars interfered with access to the adjoining property.

Neither the trustees of the Montreal Turnpike roads, nor the municipality of the parish, had any right to authorize the laying of the track of the railway on one side of the highway, so as unnecessarily to injure the adjacent property. *Ross & City Passenger Railway Co.* M. Judgment reversing, 16 Sept., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 60.

The Appellants are responsible for an accident caused by the bad state of a temporary road constructed by the Corporation of Montreal, in connection with the works on the New Aqueduct, to serve in place of the portion of the turnpike road of which the Appellants are trustees, necessarily cut off during the progress of said works. *The Trustees of the Montreal Turnpike Road & Daoust.* M. Judgment confirming, 21 Sep., 1878. Dorion, C. J., Monk. Ramsay, Tessier, Cross, JJ. Rep. 23 J. 175, 9 Rev. Leg. 651, 1 Leg. News 506.

RULE OF PRACTICE. — v. PLEADING AND PRACTICE.

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SAISIE-ARRET. — *Cession of the rights of a contractor.—Knowledge of debtor.—Dorion & Dufresne et al.* Q. Judgment reversing, Dec., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Baby, JJ., dis. as to extent to which judgment should be reversed. Rep. 5 Leg. News 418.

It is ground for a *saisie-arrêt* "That for more than a year past, said Defendant has been unable to meet his engagements, according to his own admissions;—That he has said to deponent in writing, in answer to applications for payment, that he could not hardly find money for current expenses; That he has sold and disposed of a great portion of his household furniture and effects and secreting them; That the said E. A. Prentice had a large interest in certain iron ores in Pictou, Nova-Scotia, which rights and interests the said Prentice has made away with, in whole or in part, to the prejudice of deponent and other creditors; That recently having become possessed suddenly of a considerable sum of money, he has placed the sum of $4000.00 upon a property purchased in the name of his sister-in-law." *Prentice & Austin.* M. Judgment confirming, 18 Sep., 1878.

It is no ground for the issue of an attachment against the property of Defendant, that he has advertised his furniture for sale. *Primeau et al. & Trudeau.* Q. Judgment confirming, 7 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Tessier, JJ., dis. Rep. 8 Leg. News 566.

Where by judgment on a *saisie arrêt en main tierce*, the *saisi* has been condemned to pay the amount to the creditor of his creditor, the *saisi* is not liable to an action by his former creditor, so long as the *saisie arrêt* is binding. *Théberge & Fournier.* Q. Judgment confirming, 8 June, 1876. Rep. & Rev. Leg. 390.

The attachment in the hands of a garnishee of a debt afterwards due to the Defendant by the garnishee, is valid, if such debt becomes due before the garnishee makes his declaration. *The Molsons Bank & Lionais.* M. Judgment reversing, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 252. 2 Dec. d'A. 176.

Bank shares cannot be seized by *saisie-arrêt. Hudon et al. & Painchaud et al.* M. Judgment confirming, June, 1875. Monk, Taschereau, Ramsay, Sanborn, Bélanger, JJ.

Certain goods were seized by *saisie-arrêt simple.* The Opposants intervened as being proprietors of the things seized, but instead of contesting the rights of the seizing creditor, they gave a bond that the goods should be forthcoming to answer the judgment of the Court, and thus got the things into their possession. The Plaintiff succeeded and proceeded to execute the judgment. The sureties then opposed the execution as being owners of the things. *Held,* reversing the judgment of the Superior Court, that they were estopped from urging this title as against the seizing creditor until they had returned the things seized before the Court. *Prevost & Rodgers et al.* M. 21 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dis. Rep. 24 J. 179, 2 Leg. News 237.

SAISIE-ARRET EN MAIN TIERCE.— *Contestation of Declaration.—Building Society. — La Société Permanente de Construction & Lacroix et al.* M. Judgment reversing, 18 September, 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

SAISIE EXECUTION.—The Defendant, in making an abandonment, reserved buildings constructed by him on the property after the Plaintiff got his mortgage. *Held*, that the reservation had no effect, and that the removal by Defendant of the buildings while the property was under seizure was a deterioration within C. C. P. 646. (1) *Gailloux et al. & Bureau.* Q. Judgment confirming, 8 February, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, Baby, JJ. dis. Rep. 7 Leg. News 90.

A seizure on a curator *non possidente* will be set aside on opposition. *Tempest et al. & Baby et al.* M. Judgment confirming, 20 September, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Dec. d'A. 371.

Where a land was sold conditionally on the purchaser paying the price, and the purchaser did not pay and the land was in the possession of the vendor, it cannot be taken in execution by a creditor of the purchaser. *Wilber & Boisvert.* M. Judgment reversing, 29 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, J. dis.

Of immoveable property.—Opposition to sale of part.—Lorsque par une opposition afin de distraire à une saisie d'immeubles, l'opposant ne réclame qu'une partie indivise des immeubles saisis, le créancier saisissant ne peut faire ordonner la vente de la partie qui n'est pas réclamée par l'opposant, avant que la contestation sur l'opposition ne soit vidée, ou du moins sans donner avis de sa requête à la partie saisie. *Chinic et vir & The Trust and Loan Co.* M. Judgment reversing, 31 Oct., 1883. Sir A. A. Dorion, C. J., Monk. Ramsay, Tessier, Cross. JJ. Rep. 3 Dec. d'A. 259.

The provisions contained in art. 642 C. C. P. (1) are applicable only to cases wherein the second or subsequent writ of execution against the land of a debtor is placed in the sheriff's hands while he is still in possession of the writ on which the said lands have been seized, and while he is still in a position to proceed to the sale of such lands on day fixed for the sale.

Accordingly, where an opposition has been filed to a seizure of land and the seizure has been suspended, and the sheriff has returned the writ and *procès-verbal* of seizure into the prothonotary's office, a second seizure of the same lands may validly be made for another debt, and the sheriff is not required to note such subsequent writ of execution as an opposition for payment upon the first writ. *Fuller et al & Fletcher.* M. Judgment reversing, 15 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 25 J. 93. 4 Leg. News 26, 1 Dec. d'A. 102.

In certain cases, as when the same parties have another suit pending, which may alter the balance of indebtedness, the Court may suspend execution in a case decided, and the suspension of the execution may be extended to the costs of the attornies. *Dorion & Dorion.* M. Judgment confirming, 31 october, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

SAISIE CONSERVATOIRE.—The unpaid vendor of moveables has a right, under art. 1543 of the Civil Code, to demand the resolution of the sale, under the circumstances stated in that article, even after the expiration of the

(1) The judgment, debtor cannot, nor can any other person, cut timber on the property seized or in any manner deteriorate the same, on pain of being imprisoned for a term not exceeding six months, under a rule of Court on the order of a judge in vacation.

(1) When the sheriff has seized an immoveable upon a Defendant he cannot seize it again at the suit of another creditor, or of the same creditor for another debt, as long as the first seizure subsists; but he is bound to note any subsequent writ of execution as an opposition for payment upon the first writ, and in such case the first seizure cannot be abandoned nor suspended, except in consequence of oppositions applicable as well to the seizing creditor as to those whose writs of execution have been noted as oppositions, or with their consent, or by order of a judge.

eight days allowed for revendication by art. 1999.

In an action claiming such resolution the Plaintiff has a right to attach the moveables by a *saisie conservatoire*, and, although his attachment may be in the nature of a *saisie revendication*, it will nevertheless avail to him as a *saisie conservatoire*. *Henderson & Tremblay*. M. Judgment confirming, 3 February, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

SAISIE - GAGERIE. — The writ of, should contain a description of the property leased, and a general reference in the writ to the property mentioned in a deed annexed is not sufficient. The executing officer's duty is to obey the writ and not instructions outside it. *Robitaille & Mallette*. Q. Judgment granting leave to appeal, 4 Sep., 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

The Insolvent Act of 1875, sects. 78 and 125, having given a summary recourse to privileged and hypothecary creditors against property in the hands of the assignee, has taken away the right of the lessor to proceed by *saisie-gagerie* in the hands of the assignee. *Beausoleil & Frigon*. Q. Judgment reversing, 4 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 70.

Clauses 78 and 125 Insolvent Act 1875, which gives the lessor a summary remedy for recovery of his rent, excludes the right of action by *saisie-gagerie*. *Beausoleil & Frigon*. Q. Judgment reversing, 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J., dissenting. Reported 1 Dec. d'A. 70.

SAISIE-REVENDICATION of corn in the hands of carrier. Carrier pleaded that the corn was not the property of Plaintiffs, but had been placed in his hands by one Bucknall who was the owner. Appellants (Plaintiffs in the Court below) borrowed 25,000 bushels of corn from Brown, McMinn & Co., and gave $17,560 as security. They returned the corn but did not get back their money, and the corn was sold to Bucknall who paid for it. *Held*, confirming the judgment of the Superior Court, that the Appellants had no title to the corn to permit of their attaching it in the hands of an innocent buyer, and that the carrier could plead the defence of the owner. *Borrowman et al. & Bass*. Judgment, 18 December, 1876. Monk, Ramsay, Sanborn, Tessier, JJ. The Chief Justice was present at the hearing but did not take part in the judgment.

A quantity of butter being seized by *saisie revendication*, the Plaintiff obtained possession of it, on giving security (869 C. C. P.) (1) that he would return the butter or the value of it according to the judgment to be rendered in the case. Plaintiff abandoned the suit and Defendant sued the securities for the butter or its value. *Held* that the sureties were liable. *Poulin & Hudon et al.* M. Judgment, 15 September, 1874, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Leg. News 314.

SALARY,—*Payment of, by share of profits*.—Appellant in February, 1869, agreed to serve Respondents as manager of the Life and Guarantee Departments of the Respondent's business at a salary of $2,000 and a commission of ten per cent, on the net balance carried over on the 31st December of each year in the Life and Guarantee Insurance Department after payment of all losses and expenses therein, the said agreement to date from and after the first of May, 1869, with a free dwelling on the premises of the Respondent. Appellant entered into the service of Respondent as manager under such agreement, and continued to act for

(1) The Defendant, upon a demand in revendication, may have the effects returned into his possession upon giving good and sufficient surettes that he will produce them when required, which he is in such case bound to do in the same manner as any judicial sequestrator. Nevertheless the Court or judge may, according to circumstances, grant possession of the effects to the Plaintiff, subject to the same conditions.

them from May 1869 to May 1870. The Appellant then contented that the net balance in the guarantee department which should have been carried over, and upon which he was entitled to his commission of ten per cent from the 31st December 1869, was $12,469.68, and in lieu the Respondent erroneously made the net balance $7,154.44 by deducting therefrom certain losses &c. *Held*, that he was not entitled to his 10 p. c. on accounts unsettled on the 31st Dec., and his claim must be reduced in proportion. *Rawlings & Citizens Insurance and Investment Co.* 8 R. L. 368 Q. B. 1876. M. Judgment confirming, 22 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

SALE.

§ 1. To wife, of necessaries.
§ 2. Evidence of.
§ 3. For undiscovered principal.
§ 4. Of Pledge.
§ 5. Error.
§ 6. Encumbrance.
§ 7. Promise of.
§ 8. Of stolen goods.
§ 9. Of Immoveable property.
§ 10. En bloc.
§ 11. Of book debts en bloc.
§ 12. Of undetermined rights.
§ 13. By sample.
§ 14. Of horse without special warranty.
§ 15. Déplacement.
§ 16. Faculté de réméré.
§ 17. En Justice.
§ 18. Super non Domino.
§ 19. Payment of Price.
§ 20. Judicial or Moveables.
§ 21. By Assignee.
§ 22. By Auction.
§ 23. Registration of.
§ 24. Of good will.
§ 25. Of Property of Minor.
§ 26. Delivery.
§ 27. Warranty.
§ 28. Simulated
§ 29. By Agent.
§ 30. Possession.

"Sale is a contract by which one party gives a thing to the other for a price in money which the latter obliges himself to pay for it.—It is perfected by the consent alone of the parties, although the thing sold be not then delivered; subject nevertheless to the provisions contained in article 1027, and to the special rules concerning the transfer of registered vessels." C. C. 1472.

This article establishes a rule differing from that of the old law. Under favour of the exception, the doctrine of the Courts has limited the extent of the change.

A sale may be verbal, as to evidence of such sale. *McLellan & McLellan.* M. Judgment reversing, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Bélanger, JJ. Taschereau, Ramsay, JJ., dis. as to sufficiency of evidence.

Where a sale is fraudulent the presumption of possession may be rebutted. *Kilgour & Logan.* M. Judgment confirming, 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dissenting as to the sufficiency of the evidence.

§ 1. *To wife, of necessaries.*—A wife *commune en biens*, who purchases necessaries for the family of her husband and herself, only binds the community and in no way binds herself personally, unless she afterwards accepts the community, and then only to the extent of one half, or (where there is an inventory) to the extent she may have profited by the community.

A wife, *séparée de biens*, who purchases necessaries for the family of her husband and herself, but not in her own name, and which purchases are charged by the seller to the husband, is not liable to the seller for the price of such necessaries. *Hudon et al. & Marceau.* M. Judgment reversing, 14 Dec., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 45. 1 Leg. News 603. 4 Rev. Leg. 619.

Where goods are sold to the husband and credit is given to him, his wife separated as to property will not be held liable. (The case of *Hudon et al. & Marceau*, referred to 23 J. 45.) *Paquette & Guertin et al.* M. Judgment

confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 210.

A wife *séparée de biens* is not liable for the price of necessaries furnished to the husband, and on his credit.

Nor can she become liable by endorsing his promissory note given in payment of such effects. *Bruneau & Barnes et vir.* M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Monk, J. dis. Rep. 3 Leg. News 301, 25 J. 245.

Evidence.—Where the father and son have the same names, and the vendor contends sale was to the father and not to the son, and that the entries in vendor's bookswere debited to the son, and the fact that the goods were delivered at the son's place of business will, if unexplained be conclusive evidence that the sale was to the son, and the father cannot be charged with them without proof in writing of his undertaking to pay for them. *Masson et al. & Dominique Rosaire*, père. M. Judgment confirming, 2 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A memorandum of a sale made at the request of Defendant, though not signed by him, will be a sufficient *commencement de preuve* to admit parol evidence on an action to execute a deed. *Bernard & Boutin et al.* Q. Judgment reversing, 7 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where a party by a letter refuses to receive delivery of goods, giving as pretext the failure to conform to the conditions of the contract, such letter furnishes a *commencement de preuve par écrit*, and enables Plaintiff to establish his case by parol. *Lamont & Ronayne et al.* M. Judgment confirming 15 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Where it was admitted that there was no writing to establish the alleged contract, questions put to the witness tending to prove an acceptance of the goods by words were properly overruled. *Munn et al. & Berger.* M. Judgment confirming, 31 Oct., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 6 Leg. News 363. This judgment was reversed by the Supreme Court; but the reason why, has not been revealed, save by the varying tale of rumour. It is said, that the Supreme Court *held*, that no writing was necessary. This would be a comprehensible ground, for it would only amount to a ruling on the interpretation of certain articles of the Code. But another ground has been confidently put forward by persons present when the judgment was delivered. They say, it was maintained that the evidence was stopped too soon, and that, although a writing was necessary, it did not follow this evidence might not be produced later. It is to be hoped that this last report is correct. It is better that the judges of the Supreme Court should be ignorant of the ordinary judicial rules in matters of detail, than that they should disastrously misinterpret the Code.

§ 3. *Undiscovered principal.—Tender* — A., acting for B., his undiscovered principal, sold to C. a cargo of coal to arrive, C. to have the option of taking the coal at the weight given in the bill of lading or of having it re-weighed at seller's expense. C. accepted the coal without re-weighing, but afterwards weighed it in his own yard. without notice to the seller, and mixed it with other coal. *Held*, (1) that B. the undiscovered principal, might sue on the contract in his own name. (2) That C. by tendering in his second plea the price of the coal admitted to have been received, acknowledged that the action had been properly brought by B. (3) That C. by accepting the coal without re-weighing forfeited his rights in respect to a deficiency. *The Canada Shipping Co. & The Victor Hudon Cotton Co.* M. Judgment reversing, 24 March, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. The Chief Justice & Ramsay, J. dissenting. Reported 5 Leg. News

309. 2 Dec. d'A. 356. This judgment was affirmed in the Supreme Court.

A deed of sale only transfers the title of the vendor. So where goods are seized in the possession of A, and B pretends she has a title to them from C. B. must show that the pretended vendor was owner. *Larue & vir & Molsons Bank.* M. Judgment confirming, 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J. dissenting.

A deed purporting to be a deed of sale of moveables may really be only a pledge, and if the real owner keeps the things in his possession they may be seized by another creditor, and an intervention by the party claiming on the deed will be dismissed. *Gordon et al. & Hotte.* M. Judgment confirming, 16 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 348.

A sale of moveables with a *contre-lettre* stipulating this sale was only passed to secure the payment of money due to the apparent purchaser, with the condition that the latter should retrocede the moveables as soon as the debt was paid constitutes a pledge and not a sale. *Cary & The Paper Company of Canada & al.* Q. Judgment confirming, 5 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 10 Rev. Leg. 501.

Where a deed purporting to be a deed of sale only constitutes a pledge, there must be tradition to give lien. *Parent & Falardeau.* Q. Judgment confirming, 5 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ..

§ 4. *Of pledge.*—A quantity of timber was pledged for the payment of a draft, and if the draft was not paid, the holder was to sell the wood and place the proceeds to the owner's credit. The draft was not paid, the owner of the wood became insolvent, and the pledgee sold the wood, of which he never had actual delivery. *Held*, that the pledgee could not place the balance of the price of sale, after paying the draft, to the credit of a former indebtedness of the owner. *Perkins & Ross & Smith.* Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Q. 8 March, 1880. Reported 6 Q. L. R. 65.

Where Appellant had pledged a number of shares of stock with a bank for advances and the latter sold them without authority of Appellant to do so. *Held*, that the bank was liable in damages. *Gilman & Campbell..* M. Judgment reversing, 30 December, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ.

Where a sale of real estate is made by an insolvent, to a person knowing his insolvency, and the apparent vendor keeps possession of the lands sold, the deed will be deemed to be simulated and to have been made to defraud the creditors of the vendor. *Marcoux & Leroux.* M. Judgment reversing, 29 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

Where it appears by the admission of a party that reacquired a deed to real estate to secure an hypothecary debt and that he had verbally agreed with the owner to return the land when the amount of debt and interest was paid he may be dispossessed of the property by the creditors of the vendor on their giving security that the debt and interest will be paid. *Pacaud & Huston.* Q. Judgment confirming, 8 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay, J. dissenting. Reported 8 Rev. Leg. 169; 3 Q. L. R. 214.

Real estate estimated to be worth about $1200 was sold to a person without means, for a consideration stated in the deed to be $3,650. No money was paid, and the vendors remained in possession. The vendee executed a deed of obligation and hypothec in favor of the vendors for the unpaid instalments. Two of these instalments, amounting to $2,000, were subsequently transferred by the vendors to W. in payment of goods.

Held:—That the sale of the property

and the obligation and hypothec in favor of the vendors being simulated and fraudulent, W., was entitled to have the deed of obligation and hypothec from the vendee to the vendors set aside as regards him (the vendee being a party to the suit), and to ask that the vendors be condemned to pay for the goods as his personal debtors. *Black et al. & Walker*, M. Judgment confirming, 9 December 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Cross, JJ., dissenting Rep. M. L. R. I. Q. B. 214. 8 Leg. News 67.

A sale of machinery in a mill attached *à fer et à clous*, and forming a necessary part of the mill, to a priest, the brother-in-law of the vendor, who remains in possession of the mill and machinery, and who held himself forth as owner thereof and acted as if he were such owner, will be held to be a simulated sale, and not to convey the property of the said machinery. *Thibaudeau & Mailley*, M. Judgment reversing, 25 Jan. 1883. Sir A. A. Dorion C. J., Ramsay, Tessier, Cross, Baby JJ.

A purchaser of movable property on certain conditions is not obliged to accept delivery of the articles sold, if those conditions are not complied with. *Lavigne & Villars*, M. Judgment confirming, 14 December, 1877. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier & Cross JJ.

Special warranty as to manufacturer of article sold. *Richardson & Lemesurier*. Q. Judgment confirming 7 December 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ.

Where a stove was to be made according to certain directions, and these were not complied with; but the purchaser accepted it, used it and did not tender it back, he will be compelled to pay the price agreed upon. *Semble*, the purchaser might have pleaded less value, which he did not. *Dwane & Burns*, M. Judgment confirming, 14 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A settlement of account including the goods sold is a waiver as to any objection to the quality. *Duhaime & Ayotte*, Q. Judgment reversing, 19 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Reported 3 Leg. News 273.

Where a party has accepted and retained goods sold to him for part of a contract, and afterwards declines to fulfil his part of the conditions of sale, he cannot claim damages from the other party on the ground that the goods accepted were of inferior quality. *Kennedy & Falardeau*. Q. Judgment confirming, 7 June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

It is no defence to an action for the balance remaining due on the price of an article that has been accepted and retained, that it is worthless. *Lalonde et al. & Alarie*. M. Judgment confirming, 28 January, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where real estate is sold described as being bounded on one side by "Belmont Avenue," there being in fact no avenue but a projected street, not belonging to the vendor, it is not a warranty that there will be a street made there. *Wood & St-Germain et al.* M. Judgment confirming, with some reserve 24 November, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Tessier, J., dissenting.

§ 5. *Error.*—Under a convenant to sell and convey "all the estate, right, title, interest, claim or demand" that the vendors had in certain lots specified, an action for damages cannot be maintained against the vendors for failure to deliver the whole of the lots mentioned, where they had included by mistake a lot to which they had no claim. *Fulton & McDonnell et al.* M. Judgment confirming, 21 September, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Dunkin, JJ. Reported 1 Leg. News 531.

Error in the minutes of seizure as to the contents of an immoveable bearing a cadastral number will not alone sup-

port a demand by the purchaser to have the sale amended on the ground of misdescription, even where a lot of 30 feet front is described as having 45 feet front. But where it is described as having a house upon it, when in fact the house was partly on the lot and partly on another, the purchaser may have the sale set aside for misdescription. *La Compagnie de Prêt et Crédit Foncier & Baker et al.* M. Judgment confirming, 16 Sep., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 45.

The value of a deficiency in quantity of land sold may be recovered by an action of damages, and the diminution of price allowed by art. 1201 C. C., is only a measure of damages. *Doutre & Bruyère et al.* Judgment reversing, 21 Dec., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 17.

Where property was sold without measurement to persons who had been long in possession and who knew perfectly what they were buying they will not be permitted to defeat the vendor's action by pleading the *défaut de contenance* according to an official plan. *Bruneau et vir. & Benoit.* M. Judgment confirming, 9 December, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

§ 6. *Encumbrance.* — Notwithstanding a clause in a deed of sale of land, that the purchaser might at any time keep the whole or any part of the purchase money in his hands until the vendor should furnish him with a registrar's certificate showing the property to be free and clear of all mortgages and incumbrances whatsoever, the purchaser in an action for the recovery of a portion of the purchase money, will be condemned to pay, in the absence of such a certificate, when it is shown that he has in his hands a sufficient balance of the purchase money to meet any possible disturbance or trouble in his possession of the land sold. *McDonnell & Goundry.* M. Judgment confirming, 22 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Dorion, C. J., dissenting Reported 22 J. 221.

With stipulation that a portion of the price should remain in the hands of the purchaser till the decision of certain legal proceedings relative to an assessment by the corporation for a public improvement. *Held,* that the suit had been decided, and that the purchaser was no longer exposed to any danger from the trouble provided for, and therefore was obliged to pay the balance. But that as the corporation had since obtained legislative power purporting to authorize a new assessment, the purchaser was only condemned to pay portion of the balance of the price, to wit $500 on receiving security that he would not be *troublé* by this new assessment. *Chalut & La Banque Jacques Cartier.* M. Judgment reversing, 20 September, 1882. Sir A. A. Dorion, C. J, Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dissenting as to costs. 2 Dec. d'A. 369.

Condition that the whole price should become exigible, in case of sale without the consent in writing of the vendor. The owner sold to a building society promising to erect a building and the usual clauses in such contracts of reimbursing the building society. The heirs of Logan claimed the whole price. The building society pleaded that they had a right to retain the property till they were reimbursed the money expended by the previous holder, really by the society. The Court held that the work was not done by the building society or with their money, but by the previous holder, who was personally liable, and who therefore had no claim for reimbursement. *Grant et al. & La Société Permanente de Construction.* M. Judgment reversing, 25 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A special condition of sale in which Defendant has no interest. Real estate of a substitution was sold, and the purchase money was allowed to remain in the hands of M., the purchaser, until another investment should be

found. Subsequently, a mode of investing the purchase money was duly authorized by a family council. *Held*, that M. could not refuse to pay over the money on the ground that the proposed investment was not in strict accordance with the terms of the deed creating the substitution. *Mullin et al. & Michon.* M. Judgment confirming, 14 December, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 1 Leg. News 603.

Appellants sold a piece of property to Respondent on which there was a dam. Respondent, alleging that Appellants use and have possession of this dam, calls upon Appellants to destroy it. Appellants admit that the dam is in their possession and under their control, and the judgment is for the Plaintiff Respondent. *Price et al. & Chartre.* Q. Judgment confirming, 4 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

§ 7. *Promise of.*—Wilber gave Croteau a deed *sous seing privé* to the following effect:

"This indenture or bond..... wit-
"nesseth that John Wilber..... *hath*
"*this day sold, granted and bargained,*
"to the said John Croteau..... for the
"consideration or price of one thou-
"sand dollars currency, lot No,——"

"When the said John Croteau has
"paid the said sum of one thousand
"dollars and all interest thereon, the
"said John Wilber will give the said
"John Croteau a good and warranty
"deed."

Croteau did not pay the price or any part of it, and before seizure he desisted from the purchase and gave it back to the vendor. *Wilber & Boisvert.* M. Judgment reversing, 29 March, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ. Tessier, J. dis.

Action to oblige Defendants to execute deed of sale. Question as to interpretation of agreement to divide hypothec according to a plan. *Archambault & Massicotte.* M. Judgment confirming, 14 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier. Cross, JJ.

Evidence as to verbal promise of sale. *Payton & Grandchamp.* M. Judgment reversing, 21 December, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, Tessier, JJ. dissenting.

Action to oblige Defendant to execute a deed of sale of real estate or pay damages. *Held*, that the following letter from the promisor implied that there were no encumbrances on the property save "$2,300 mortgage on ground":

"Dear Sir,

"I can offer you the house No 78 Fort St. at $4,300.00, on the following terms: $1,000.00 cash, $1,000.00 in about two years, balance $2,300.00 mortgage on ground can remain as long as buyer requires, or can be paid off at any time, interest at 7%. The above is the lowest price, but the first payment might be reduced somewhat, if it is an object.

"Yours truly,

"W. JONES.

"ALLAN RITCHIE,
"26 Hospital St."

Gauthier & Ritchie. M. Judgment confirming, 20 Jan., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, Tessier, JJ. dis.

The Respondent not being put *en demeure*, did not forfeit his right to obtain a deed of sale by his failure to make the yearly payments agreed upon, or by his failure to ratify. *Grange & McLennan.* M. Judgment confirming, 27 Jan., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ. The Chief Justice, dis. Rep. 6 Leg. News 138. 3 Dec. d'A. 212. This judgment was reversed in the Supreme Court, it being there held Sir W. J. Ritchie, C. J., Strong, Fournier, Henry, Ta-chereau, Gwynne, JJ. Fournier & Taschereau, JJ., dissenting), that the condition precedent on which the promise of sale

was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any *demande*, the necessity for a *demande* being inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to lessor and lessee.

A *promesse* de *vente* will be set aside if the party seeking to purchase fails to fulfil the conditions of the deed. *Charlebois & St. Germain.* M. Judgment confirming, 18 December, 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 306.

§ 8. *Of Stolen Goods.*—Notwithstanding anything contained in articles 1488 and 2288 of the Civil Code of Lower Canada, a valid sale or pledge cannot be made of stolen goods, except in the cases mentioned in article 1789, so as to divest the real owner of his right to reclaim them from the purchaser, or pledgee, without reimbursing the price paid for or advances made on such goods, although the purchaser or pledgee may have bought or made advances on the stolen goods *bona fide* in the ordinary course of his business.

The words "nor in commercial matters generally" in article 2268 do not protect a trader acquiring stolen goods in any commercial transaction, whether from a trader dealing in similar articles or not, but apply, apparently, to cases where the possession of the goods is obtained in a commercial transaction, whether by sale or otherwise, *but under the same circumstances by which a sale would be protected under article* 1489. *Cassils et al., & Crawford et al.* M. Judgment reversing, 15 March, 1876. Reported 21 J. 1.

A farmer selling cordwood from his land is a trader dealing in similar articles within the meaning of C. C. 1489.

Wood cut and sold from land held under a "*location ticket*" containing a prohibition to cut wood, is not stolen property within the meaning of the above article. *The Canada Paper Co. & The British American Land Co.* M. Judgment reversing, 20 September, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 310.

S. having cut timber without authority on the timber limits of the Respondents, sold the logs, to E. and transferred the price to the Appellants. The logs were sold for 80 cts per standard, and the standing timber from which they were made was worth 40 cts per standard. E. owed a balance of $3188.76 on the price of the logs purchased from S.

Respondents, claiming that S. had no right to sell the logs and that the transfer of the price to Appellants was made in fraud of S's creditors, and that they were entitled to the balance due by E, sued the three, asking that E. be adjudged to pay them the $3188.76 he owed.

Respondents were entitled, at their option, to claim their timber from E, on re-imbursing him what he had paid for it, or to claim the balance of the price which he owed. (Arts. 434-440 C. C.)

As to S, they were entitled to claim the timber on reimbursing him the price of the labor to convert it into logs and convey it to market. (Art. 434 C. C.)

S. could only transfer the price of labour to which he was entitled, and not the value of the timber, and that Respondents and Appellants were entitled each to one half of the balance due by E, being in the proportion which the value of the timber bore to the price of the labour. (Arts. 434 and 440 C. C.) *Millar et al. & The Merchant's Bank of Canada.* M. Judgment reversing, 29 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 3 Dec. d'A. 79.

§ 9. *Of immoveable property. — Trouble. — Unregistered hypothecs.—*

The purchaser of real estate who is not evicted nor disturbed in his possession, has no right to obtain the resiliation of the sale by reason of certain undischarged hypothecs registered against the property (far exceeding in amount the whole capital of the purchase) and which were not declared to him in the deed, unless the vendor sold with a stipulation of *franc et quitte*. *The Grand Trunk Railway Company of Canada & Brewster*. M. Judgment reversing, 20 January, 1883. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. 6 Leg. News 34.

Plaintiff sued for instalment of price of sale. He was met by an answer that part of the lands belonged to the Crown, and Defendant concluded for resiliation of the lease. This admitted that Plaintiff gave Defendant possession of the lands and that the latter is still in possession. The Superior Court by its interlocutory judgment ordered the parties to establish the line between the Seigniory of Courval and the Township of Wendover. An appeal was taken from this judgment. The Court set aside the said interlocutory judgment and condemned the Defendant Respondent to pay the amount of instalment due, on the Plaintiff, Appellant, giving security that Respondent would not be *troublé*. Judgment, 8 Sep., 1880. Sir A. A. Dorion, C. J., Monk, Tessier, Cross, JJ. Ramsay, J., dis. on the ground that the conclusions of Defendant were to annul the deed, and that there was no demand for security, nor any proof of *trouble*.

§ 10. *En bloc*. — By a writing *sous seing privé* L. purchased from D. 2265 cords of wood " as now corded at Port Lewis " for the sum of $4520, and by the same writing acknowledged receipt of the wood, declared himself satisfied therewith, and discharged the vendor, " *de toute garantie ultérieure*." The purchaser having measured the wood, found it 423 cords short, and a portion of it rotten. Suit for value of wood not delivered and of the part that was rotten. *Held*, that by the terms of the agreement the sale was *en bloc*, and not by the cord, and the purchaser could not recover. *Latreille & Drolet*. M. Judgment confirming, 14 December, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 1 Leg. News 29.

§ 11. *Of book debts en bloc*.—Question of evidence. *Tarte & Blumhart*. Q. Judgment reversing, 7 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The sale of the estate *en bloc*, that is the estate moveable and immoveable, does not prevent the Sheriff from levying the tax of one per cent. allowed under section 140 of the Insolvent Act of 1875, on so much of the amount of the sale as represents the real estate. *Evans & Chauveau*, M. Judgment confirming, 22 November, 1881. Sir A. A. Dorion, Ramsay, Tessier, Cross, Baby, JJ.

A sale of 7924 shares of the stock of a railway company by the sheriff will not be declared null, because they were sold *en bloc* ; nor under the article 595 C. C. P. because they realized a sum much greater than sufficient to pay the debt, where there was no fraud, and the whole transaction was for the apparent interest of the parties concerned. There being no opposition to the sale, and the sheriff was therefore obliged to sell according to the seizure, unless required by the defendant to alter the order of sale (595 C. C. P.) (1) *Morris & The Passumpsic & Connecticut Rivers Railroad Company*, M. Judgment reversing, 25 September, 1876. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ.

§ 12. *Of undetermined rights*.—Does not imply a warranty that they exist. *Gareau & Deseve*, M. Judgment confirming, 18 September, 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ.

§ 13. *By Sample*.—Where at an auc-

(1) The sale must not proceed beyond the amount necessary to pay the debt in principal, interest and costs. To this end the judgment debtor as a right to determine the order in which the effects are to be put up for sale.

tion sale of damaged goods, for benefit of whom it may concern, without warranty, samples are produced at the request of a buyer, he finding it difficult or inconvenient to go down into the hold of the ship to examine the goods (wheat in bulk), it will not be presumed that this is a sale by sample. *McLeod & Monham*, Q. Judgment confirming. 8 Sep. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Cross, JJ. Dis.

Where there was a sale of coal of a certain kind, being the cargo of a certain ship, and the contract gives no special warranty as to quality, as by sample, the sale will not be held to be by sample. *The St Lawrence Tow Boat Company & Crawford et al.* Q. Judgment confirming, 5 June, 1876.

Goods sold by sample.—Evidence.—Cushing & Coutu et al. M. Judgment 22 June, 1877. Sir A. A. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, Sanborn, JJ. diss.

Of horse without special warranty is only null if the animal has a concealed vice redhibitoire. Wind-gall is not a vice redhibitoire in a horse.—In an action to annul the sale of a horse for one *vice*, the Court is justified in refusing to allow Plaintiff to amend his declaration and to allege another *vice*. Plaintiff should know why he seeks to set aside a sale at the time he makes the demand.

Under article 1530 C. C. no time is fixed precisely for bringing an action to annul for *vice-redhibitoire*. It is a question of diligence left to the discretion of the Court. *Lanthier & Champagne*. M. Judgment confirming, June 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J., dis.

§ 15 *Deplacement.*—The sale of goods without *déplacement* gives rise to the presumption that the sale was simulated. *Dupuy & Cushing*. M. Judgment reversing, 22 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Ramsay, JJ., dis. Rep. 22 J. 201. Confirmed in Privy Council (1) on the ground that their was evidence of simulation, without pronouncing as to whether there would be no *déplacement* alone, since the Code, would of itself give rise to the presumption that there was simulation.

The Respondent sold machinery to Joseph Kieffer. This machinery was in the hands of a firm styled Kieffer Brothers, both of the parties being brothers of Joseph Kieffer. One White purchased the machinery from Joseph Kieffer, and Whitehead sought to recover the machinery alleging that his sale to Kieffer was a simulated sale. While this litigation was going on, Whitehead obtained an order of a judge giving him provisional possession of the machinery. Disregarding this order the Kieffers and White had the property transferred to the possession of White, Whitehead then took a rule for contempt against them, on which they were condemned to restore the goods in three days. This order they again disobeyed. The majority of the Court decided that White should be fined $100 for his contempt, but that he should not be compelled to deliver up the machinery, because in another action, in which judgment was rendered on the same day as the judgment on the rule, the machinery was declared to be the property of White. Judgment condemning White in a fine of $200. *Whitehead & Kieffer*. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J., dissenting thought the judgment should be confirmed. The machinery was White's so far as an appealable judgment could make it so, but he had possessed himself of it illegally and he should not be allowed to profit by his wrongful act. It was an occasion to apply the rule, applicable in all possessory proceedings: "*Spoliatus ante omnia restituendus.*" Judgment 30 June, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J., dis.

Though *déplacement* is no longer

(1) *See* APPENDIX.

necessary to the validity of a sale, yet where there is no *déplacement* fraud and simulation are easily presumed; and where a pretended sale was a mere contrivance intended to obtain, under color of a sale, a security upon the effects, and thus avoid the delivery of possession which is essential to the validity of a pledge, it was held inoperative. *Moffat & Burland.* M. Judgment reversing, 27 May, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 4 Dec. d'A. 59. 7 Leg. News 182. Reversed in Supreme Court. 11 Sup. Court Rep. 46.

A sale of moveables without *déplacement* gives rise to a presumption of simulation or fraud. *Danjou & Pelletier.* Q. Judgment reversing, 6 Sep., 1880. Sir A. A. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ.

§ 16. *Faculté de Reméré.—Lease.—Trouble.*—This case is only interesting as an example of the litigation that may be got up about trifles. *Baptist & Duval.* Q. Judgment confirming, 8 September, 1880. Sir A. A. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dissenting.

§ 17. *En justice.*—Where a minor is authorized to sell property, the sale is not rendered null by the insertion of the stipulation that in case the interest is not paid the whole price will become due, although such stipulation is not made a condition of sale by the order. *Watts & Paquette.* M. Judgment confirming, 22 June, 1876. Monk, Ramsay, Sanborn, Tessier, Sicotte, JJ. Sicotte, J. dis. Rep. 9 Rev. Leg. 252.

In the proceedings of a sale by authority of justice, in execution of a judgment, the *criées* are as nothing against the possession of the owner. *Baptist & Dupré & al.* Q. Judgment confirming, 8 February, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

L'un des trois adjudicataires conjoints, qui est un des créanciers colloqué, peut demander la vente à la folle enchère de l'immeuble entier, sur le défaut des deux autres adjudicataires de payer leur part de prix. *McGreevey & al. & Leduc.* Q. Judgment reversing, 8 May, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk, Ramsay. JJ. dissenting. Rep. 10 Q. L. R. 188.

An *adjudicataire* who has not been able to obtain a title to the real estate adjudged to him, owing to the judgment of distribution not being rendered and this not by any laches on his part, may, within a year of rendering such judgment, obtain a writ of possession authorizing him to put the *adjudicataire* in possession; and the Defendant, will not be maintained in his pretention that he has been in open and peaceble and public possession of the said immoveable for more than a year and a day, prior to the demand of possession. *Burke & Langlois.* Q. Judgment confirming, 5 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 560, 2 Leg. News 202.

In judicial sales in execution of a judgment, the purchaser has no action of *garantie* against the creditor seizing. His recourse against him is either that provided by article 1586 or 1587 C. C. *Ruest & Thompson et al.* Q. Judgment confirming, 7 October, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

On an *inscription* by an interested creditor, a Sheriff's title may be declared *faux*. And this although the Sheriff's title be registered, and that the immoveable has passed into the hands of a third party whose title also was registered. *Carpenter & Déry.* Q. Judgment confirming, 5 March, 1877. Sir A. A. Dorion, C. J., Ramsay, Sanborn, Tessier, JJ. Sanborn, J. dis. Rep. 5 Q. L. R. 311. 8 Rev. Leg. 283.

Where a creditor opposes for money on the proceeds of a sale by the Sheriff, and it appears that the Sheriff and *adjudicataire* have made a transaction by which instead of the actual payment of the money they have substituted compensation between a debt due by the Sheriff who is insolvent, to the *adjudicataire* and his family, the return of the Sheriff will be declared *faux* and

a *folle enchère* be ordered. *La Société de Construction Permanente de Québec & Martin.* Q. Judgment reversing, 7 Sept., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, McCord, JJ. Rep. 10 Rev. Leg. 619.

Lorsque par une opposition afin de distraire à une saisie d'immeubles l'opposant ne réclame qu'une partie indivise des immeubles saisis, le créancier saisissant ne peut faire ordonner la vente de la partie qui n'est pas réclamée par l'opposant avant que la contestation sur l'opposition ne soit vidée, ou du moins sans donner avis de sa requête à la partie saisie. *Chinic et vir & The Trust and Loan Co.* M. Judgment reversing, 31 October, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Dec. d'A. 259.

Immoveables in the possession of third parties cannot be taken in execution as being in the possession of the curator of a vacant estate claiming title to such property. A judgment cannot be executed against those who were not defendants until it has been declared common. M. Judgment confirming, 20 September, 1882. Sir A. A. Dorion, C. J., Monk, Tessier, Cross, JJ. Rep. 2 Dec. d'A. 371.

Against lands.—The provisions contained in art. 642 C. C. P. (1) are applicable only to cases wherein the second or subsequent writ of execution against the lands of a debtor is placed in the Sheriff's hands while he is still in possession of the writ on which the said lands have been seized, and while he is still in a position to proceed to the sale of such lands on the day fixed for the sale.

Accordingly, where an opposition has been filed to a seizure of land and the seizure has been suspended, and the Sheriff has returned the writ and *procès-verbal* of seizure into the Prothonatary's office, a second seizure of the same lands may validly be made for another debt, and the Sheriff is not required to note such subsequent writ of execution as an opposition for payment upon the first writ. *Fuller et al. & Fleicher.* M. Judgment reversing, 15 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 25 J. 93. 4 Leg. News 96, 1 Dec. d'A. 102.

In certain cases, as when the same parties have another suit pending, which may alter the balance of indebtedness, the Court may suspend execution in a case decided, and the suspension of the execution may be extended to the costs of the attornies. *Dorion & Dorion.* M. Judgment confirming, 31 October, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Under the insolvent act, 1875 (Sect. 125) a proceeding *en nullité de décret* by assignee must be brought in the insolvent court by summary petition, and not by any suit or other proceeding whatever.

See also art. 715 C. C. P. *Mitcheson et al. & The Montreal Loan & Mortgage Company,* M. Judgment confirming, 20 March, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby JJ.

Where effects have been sold by authority of justice, and the purchaser, a creditor, has left them in the hands of the orignal owner, promising to sell them to him, provided the original owner should pay to him what he had paid for them, such promise will not constitute a sale unless the said sum be paid, and the purchaser may revendicate such effects in the hands of the original owner. And the court will not be warranted in giving the defendant the option to pay the price, unless it be pleaded or be offered by the Plaintiff. *Rasconi & Duguay,* M. Judgment reforming, 26 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby JJ. 4 Dec. d'A. 47. Confirmed in Supreme Court.

The rescission, on the ground of fraud, of a deed transferring real estate, will not affect the rights of a third party, who in good faith has lent money on the property while in the possession of the purchaser, where the vendor, by his own act or fault, has to some extent

induced the third party to make the advance. So, where the Plaintiff sold certain real estate to Defendant (who then obtained an advance from C. on the security of the property), and in the deed from Plaintiff to Defendant, it was declared that the consideration was cash paid by the purchaser, whereas in fact the consideration was mining stock which turned out to be worthless, it was *held* that the Plaintiff was in fault in permitting and requesting such misstatement which might to some extent have induced C. to advance money on the property; and therefore the Plaintiff was entitled to obtain the rescission of the deed for fraud, only *on condition of the reimbursing to C. the amount of his advance. Ligthall & Craig.* M. Judgment confirming, 22 September, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 275.

§ 18. *Super non domino.*—Where an *adjudicataire* has neither paid the price of adjudication, nor given security as required by law, but has obtained possession under a deed from the Sheriff, falsely alleging that security had been given, the Plaintiff cannot have the property resold *à la folle enchère* of the *adjudicataire*, and over the head of a purchaser who was actually in possession, although the said purchaser was obliged to give the security required of the *adjudicataire. Tremblay & Hill et al.* Q. Judgment reversing, March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Monk and Ramsay, JJ., dis.

A sale by the Sheriff of a property over the usufructuary is a sale *super non domino* and consequently null. *Tessier & MacNider*, M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J., dis.

Where a lot of land sold at Sheriff's sale was described in the minutes of seizure and in the advertisements, as having a two-story wooden house thereon erected, while in fact the house in question was erected partly on the lot sold and partly on the adjoining lot, it was proved, moreover, that the purchaser would not have bought if he had been aware of the error, the sale will be vacated at the suit of the purchaser on the ground of misdescription.

An error in the minutes of seizure as to the contents of an immoveable bearing a cadastral number will not alone support a demand by the purchaser to have the sale vacated on the ground of misdescription, even where a lot only thirty feet frontage was described as of forty five feet frontage. *La Compagnie de Prêt et Crédit Foncier & Baker et al.* M. Judgment confirming, 16 Sept., 1879. Reported 24 Jurist 45.

Where an immoveable sold by the Sheriff is described as being bounded on a projected street, which is proved to be the only means of communication from the property to the public highway, and such street is found subsequently to have no legal existence, and that it is clear the *adjudicataire* would not have purchased had he known that no such street really existed, the sale will be set aside on the petition to that effect by the *adjudicataire.*

The *adjudicataire* has a right, under the circumstances, to recover from the parties collocated in the judgment of distribution of the proceeds of said sale, the amounts of their respective collocations with interest. *Moat et al. & Moisan.* M. Judgment confirming, 19 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J. dissenting. Reported 25 J. 218.

Where by artifices such as the passing of false deeds changing the *tenans et aboutissans*, a Sheriff's sale has been carried out so as to mislead creditors and the public, the sale will be set aside on petition of an hypothecary creditor, who would otherwise be deprived of his security by such fraudulent manœuvres. M. Judgment reversing, 29 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

In 1830, J. M. Soulard, *auteur* of the Appellant, plaintiff *en garantie*, acquired an immoveable by exchange from

Letourneau the Defendant *en garantie*. Subsequently, Soulard was *troublé* in his enjoyment by an hypothecary action, and called in Letourneau as his *garant*. The debt was not paid, and the land was sold *par décret*. Soulard became *adjudicataire*. Subsequently, his son, the present Appellant, was *troublé* by an action for dower not purged by the *décret* and he again called on Letourneau as his *garant*. L. pleaded that he was no longer his *garant* because he held his title of the Sheriff and not of him.

The majority of the Court held, reversing the judgment of the Court below, that the *décret*, which did not purge the claim, did not affect the right of Soulard representing his father to claim the protection of *his garant*. *Soulard & Letourneau*. Judgment reversing, 7 Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Dorion, C. J., Sanborn, J., dis. Rep. 19 J. 40.

Nullité de décret.—"A sale by the "Sheriff of Montreal, at his own office, "of land situated in the parish of l'En- "fant Jésus, a duly erected parish for "all civil purposes formed out of the "parish of Montreal, is illegal, null and "void, and that such sale could only "be legally effected at the church door "of the parish of l'Enfant Jésus."

"Such nullity can be invoked by a "hypothecary creditor by petition, "without a writ of summons, duly "served on all the parties interested. "(Art. 715 C. of C. P.)"

"Such nullity may also be invoked "by means of an opposition, filed after "the sale, and served on all the inter- "ested parties, and containing all the "essential allegations of a petition *en "nullité de décret*." *Fauteux et al. & The Montreal Loan and Mortgage Co.* M. Judgment reversing, 21 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 282, 2 Leg. News 10. Confirmed 3 Sup. Court. Rep. 411.

A Sheriff's sale of lands may be set aside where it appears that the whole transaction was got up for the purpose of purging the land so sold of the hypothec with which it was charged. *Bourque & Bissonnette*. M. Judgment reversing, 29 September, 1881.

The sale of real estate as belonging to an insolvent and which is the property of another, will be set aside on the suit of the real owner, who retained his civil possession of the property, although such owner has negleced to correct the error of the cadastre which set forth the property belonged to the *auteur* of the insolvent. *Shortis & Senkerhoff et al.* Q. Judgment reversing, 8 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dissenting thought the insolvent had the appearance and was reputed to be in possession of the property, and therefore that the seizure was properly made, within the meaning of art. 632 C. C. P. (1) The judgment in the Superior Court and in appeal will be found reported, 11 R. Leg. 537.

The purchaser who has paid the price, and who is in danger of being *troublé*, cannot call upon the suing creditor to re-imburse him. He has no recourse till be is actually disturbed in his possession. *The Trust and Loan Co. of Canada & Quintal*. M. Judgment reversing, 19 January. 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Reported 2 Dec. d'A. 190.

Sale by Sheriff over the head of the usufructuary is a sale *super non domino*. *Lavigne & McNider*. M. Judgment confirming, 2 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J., dis.

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(1) The seizure of immoveables can only be made against the judgment debtor, and he must be or be reputed to be in possession of the same *animo domini*. No seizure can be made of immoveables declared by the donor or testator thereof, or by law, to be exempt from seizure. Constituted rents representing seignorial dues are seized and sold with the formalities prescribed by the act 27-28 Vic., cap. 39.

A person cannot oppose a seizure of real estate, though the opposition is based on posse-sion, when the Opposant's title appears to the Court to be manifestly fraudulent and simulated. *McCorkill & Knight.* M. Judgment confirming, 22 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 1 Leg. News 42, confirmed in the Supreme Court 3 S. C. Rep. 233.

A railway may be seized and sold by a holder of debentures, by which, in terms of the law, the road is mortgaged and hypothecated for security of the debentures. *The Corporation of the County of Drummond & The South Eastern Railway Co.* M. Judgment reversing, 20 Dec., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay. Tessier, Cross, JJ. Tessier, J., dis. Rep. 24 J. 276, 3 Leg. News 152.

§ 19. *Payment of Price.—Menace of eviction.*—L'acheteur qui, sur une vente par le shérif, a payé son prix de vente, ne peut forcer le créancier poursuivant le décret, qui a reçu le prix de vente, à le rembourser sous le prétexte qu'il est exposé à être troublé, et qu'il ne peut exercer de recours contre tel créancier s'il est troublé dans sa possession. *The Trust and Loan Co. & Quintal.* M. Judgment reversing, 19 Jan., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 190.

The following condition was inserted in the *cahier de charges* of real estate intended to be sold by auction for the benefit of heirs : " The purchaser shall " be obliged to pay, over and above the " price of adjudication, at the time of " the execution of the deeds of sale, to " Théodore Doucet, notary, four per " centum upon the price of adjudication, " which percentage will cover the no- " tarial legal commission, the auction- " eer's commission, and all necessary " costs and expenses incurred to effect " the sale of the said lots, and will also " include the costs of the deeds of sale " —and of one copy thereof for the ven- " dors, and the costs of registration." The sale did not take place, and the property was bought in for the heirs, " a right to make one bid being re- " served to the vendors in the *cahier* " *des charges*, the Respondent there- " fore was under no liability to pay any- " body the amount of the commis- " sion, which was after all part and " parcel of the price ; no part of which " was payable under the circumstan- " ces." *Doucet et Pinsonneault.* M. Judgment confirming, 19 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross. JJ. Rep. 23 J. 163.

§ 20. *Judicial of Moveables.—Déplacement.*—Where moveables have been sold at judicial sale, and the purchaser in good faith has allowed the effects to remain in the Defendant s possession, he, or his representatives, may oppose the seizure and sale of such effects at the suit of another creditor.

The verbal testimony of the purchaser is admissible, as against such other seizing creditor, to prove the transfer of the effects from the first purchaser to the transferee opposant. *Senécal & Crawford.* M. Judgment reversing, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 256. 2 Dec. d'A. 121.

§ 21. *By assignee.—Liability of assignee.*—Assignee, under Insolvent Act of 1865, may be sued as such in an ordinary action of damages where he has sold as belonging to the insolvent, property not belonging to the insolvent. *Stewart Farmer.* M. Judgment confirming, 17 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier. Cross, JJ. Rep. 3 Leg. News 33.

The *défaut de contenance* in real estate sold by assignee, gives to the adjudicataire the right to demand the diminution of price in the proportion of the quantity missing ; and he can recover back the money after it is paid, if he has paid in error. *Thomas & Murphy.* Q. Judgment confirming, 6 March 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 231.

The assignee of an insolvent estate sold the assets *en bloc* for the sum of $34,000.00. The purchasers paid the

whole amount before it was due, on an express agreement in writing by the assignee that he would pay them for any deficiency that might be found to exist in the assets sold, in the proportion of an estimate made in pencil upon the inventary annexed to the deed of sale. It appeared that one asset consisted of 150 shares of Railway and Newspaper Advertising Co. stock, of the par value of $15,000.00 on which $9,357.24 were still unpaid, and a transfer of this stock could be made to the purchasers only subject to the liability of paying such calls as might be made, which liability was unknown to the purchasers when they purchased the estate, and they declined to assume the responsability.

Although there was no warranty stipulated at the time of the sale, the assignee being unable to deliver the stock sold, was bound to refund a part of the price in the proportion that the value of the stock bore to the value of the whole assets ;—and, in the absence of evidence to the contrary, the separate valuation of the stock marked upon the inventory (which valuation had been concurred in by both parties) might be taken to be the true value of the asset not delivered. *Dixon et al. & Perkins.* M. Judgment reversing, 8 November, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Cross, J. dis. Rep. 25 J. 117. 1 Dec. d'A. 1. 3 Leg. News 364.

A municipality which seizes and sells a land not within its juri-diction, or for taxes not due, is liable to the *adjudicataire* as *garant*; and the municipal council may validly *transiger* with the *adjudicataire*. *Bachand & The Corporation of St. Théodore d Upton*, M. Judgment reversing, Sep., 1874. Monk, Taschereau, Ramsay, Loranger, Beaudry, JJ. Monk, Beaudry JJ. dis.

L'Intimée, appelée à la substitution créé par le testament de son père, réclame par action pétitoire, de l'Appelant un immeuble faisant partie des biens de la dite substitution. L'Appelant, dans sa défense, allègue qu'il a acquis cet immeuble à une vente judiciaire, à la poursuite d'un créancier, préférable à la substitution, laquelle se trouve en conséquence purgée par le décret. Réponse de l'intimée que cette créance n'était préférable à la substitution que par l'enregistrement tardif du testament créant la dite substitution, et que l'Appelant ayant été son tuteur ne pouvait se prévaloir de ce défaut. Aucune allégation de la connaissance du testament par l'Appelant n'est faite dans la dite réponse.

Jugé :—Que l'Appelant ayant invoqué, à l'encontre de l'action pétitoire, un titre bon et valable à sa face, l'intimée était tenue d'en démontrer la nullité et, qu'en l'absence d'allégations et de preuve que l'appelant, tuteur de l'intimée, connaissait l'existence de ce testament, il est bien fondé à en invoquer l'enrégistrement tardif. *Moise Terrien & Labonté.* M. Judgment reversing, 16 Dec. 1881. Monk, Ramsay, Tessier, Cross, Baby JJ. Tessier J. dis. Rep. 2 Dec. d'A 90.

The conditions of a sale set forth in the *cahier de charges* cannot be altered to the prejudice of the *adjudicataire* So where the *adjudicataire* was to retain one-sixth of the price until the opening of a substitution, he cannot be compelled to pay the sixth before the event, or until it becomes impossible. *Comte & Archambault et vir.* Judgment reversing, 16 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 102.

§ 22. *By auction.*—A property offered for sale at an up-set price, may be withdrawn if an amount equal to the up-set price is not offered within a reasonable delay, and before the property is withdrawn. *Mallette & Lenoir es-qu.* Judgment confirming that of Sup. Court, 18 Dec. 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Chief Justice Dorion, who sat at the hearing took no part in the judgment, as he had been sworn administrator of the Government of the Province of Quebec in the interval.

The sale of land in lots at the public auction is governed by the French law.

Each adjudication of a lot is a separate contract.

By the majority of the Court (Monk, Ramsay & Tessier, JJ.) A single false bid on any lot sold destroys the consent of the purchaser of such lot, and renders the sale null and void, even without proof of fraud and damage.

The presence of false bidders who bid on some of the lots offered does not annul the sale of a lot on which there was no false or by-bidding, unless the purchaser of such lot alleges and proves fraud on the part of the vendor, and damage to himself by the enhancement of the price above the current value.

Such by-bidding is a cause of nullity only where the purchaser shows that he has suffered damage therefrom. That in this case if there was by-bidding on any of the lots sold to the Defendant, it caused him no damage, and therefore the sale should be enforced.

By Ramsay, J.—By-bidding where extensively practised at an auction sale is a fraudulent breach of the contract implied in a sale by auction, and therefore annuls the adjudications, even of lots on which there was no by-bidding, unless the vendor clearly establishes that the purchaser was in no respect injured by the by-bidding at the sale generally. *Jetté et al. & McNaughton.* M. Judgment reformed, 22 September, 1876. Reported 20 J. 255.

The Appellant agreed with Respondent that he should not bid at the sale of certain property on which she had a claim, and that he would pay Respondent the amount. *Held*, confirming the judgment of the Court below that this was a valid contract. *Beaudette & Mahoney.* Q Judgment confirming, 6 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 5. Q. L. R. 165.

It is not unlawful for a party to agree not to bid at the sale of his debtor's property, on condition that another creditor will pay him his debt. *Beaudette and Mahoney.* Q. Judgment confirming, 6 March, 1879. Reported 5 Q. L. R. 165.

Identity of articles sold. *Burland & Roberts.* M. Judgment confirming, 22 March, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

§ 23 *Registration.*— Knowledge by subsequent purchaser that property has been, already sold to another, whose deed of sale is not registered, does not invalidate the second sale. *Farmer & Devlin et al.* M. Judgment confirming, 14 December, 1877. Dorion, C. J., Monk. Ramsay, Tessier, Cross, JJ.

A vendor of real estate before the Code, may have the sale set aside as against the hypothecary creditor of the purchaser, although the deed of sale be not enregistered. *Hart & Abbott.* Judgment confirming that of Superior Court, 4 Sep. 1878. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ.

§ 24 *Of good-will.*—The sale of the good-will of a pawn-broker's business, with an undertaking by the vendor not to act as a Pawn-broker in a certain place, gives right to an action of damages for violation of the stipulation by the vendor. *Moss & Silverman.* Judgment confirming that in Review, Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A sale by Appellant, a biscuit manufacturer, of his stock-in-trade, with the good-will and all advantages pertaining to the name and business of the vendor, conveyed the exclusive right to use the name "Mackinnon's, as well as the device of a boar's head grasping in its paws a bone (which had been in use by Appellant prior to and at the time of the sale), on labels used and generally in all matters connected with said business, and, consequently, that Appellant had no right after such sale to use said name and device in the manufacture and sale of biscuits. *Mackinnon & Thompson.* M. Judgment confirming, 20 Nov. 1882. Sir A. A. Dorion, C. J., Monk, Ramsay,

Tessier, Cross, JJ. Rep. 26 J. 321. 5 Leg. News 396. 3 Dec. d'A. 12.

A sale by a retiring partner to his co-partner of the "good will" of the business, implies an obligation on the part of the retiring partner to abstain from undue competition with the purchaser of the good will; and where the retiring partner opened a similar shop in the immediate vicinity, and sent circulars to the customers of the late firm, and thereby sought to create the impression that he had succeeded to the firm's business, it was *held* that he had violated the obligations imposed by the contract of sale of good-will. *Findlay & McWilliam.* Judgment reversing, 17 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 23 J. 148. 9 Rev. Leg. 642.

Where two persons, sued jointly on a writing, plead together to the merits, they cannot afterwards urge that the signature to the writing is not the signature of both or of either of them, more especially in the absence of an affidavit denying the signature as required by art. 145 C. C. P.

The sale of the right to use an invention contains a warranty that the invention is new and useful.

The purchaser of such right is not required to have the patent set aside before he can recover the price paid by him.

The use of a patent for manufacturing purposes is a commercial matter. *Déry et al. & Hamel.* Q. Judgment confirming, 6 December, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 7 Leg. News 405. 11 Q. L. R. 24.

Dans l'interprétation des articles 2243 et 2258 C. C., c'est l'article 2258 qui s'applique à l'espèce actuelle.

L'action en annulation du contrat de vente par la fille à son père et ès-tuteur, sans reddition de compte, est sujette à la prescription de 16 ans de même que l'annulation de l'inventaire à cause d'informalités ou erreurs. Art. 2258 C. C.

A raison de cette vente équipollent à compte et décharge précédé de l'inventaire à son père et es-tuteur par la femme mineure émancipée et son mari communs en biens, l'action est prescriptible par dix ans, art. 2256 C. C. *Grégoire & Grégoire.* M. Judgment reversing, 25 January, 1885, Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk, J. dissenting. Rep. 12 Q. L. R. 32; M. L. R. 2. Q. B. 225.

Where wine was sold by sample and accepted by the buyer without comparison, paid for or sold again by him, he cannot tender it back to the seller after a year and compel him to return the money, owing to its being of inferior quality. There was no error in the contract, and the only ground on which the contract could be set aside was that the wine had a *vice redhibitoire.* In such case the action complained of must have been brought with "reasonable diligenec, according to the nature of the defect, and the usage of the place where the sale is made." 1530 C. C. *Guest & Douglas.* Judgment confirming. 27 may, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A sale by authority of justice may be set aside for fraud and collusion, even where the proceedings are in appearance regular. (589 C. C. P.) But where the essentials of an auction sale are wanting the sale may be declared null. So where there is only one bidder at an auction sale, brought there by the bailiff, and to whom all the articles were sold *à vil prix*, the principal article a piano being the property of the defendant, the sale of such article will be set aside, independently of any proof of fraud or collusion. (589 C. C. P.) *Nordheimer et al. & Leclaire.* M. Judgment reversing, 21 September, 1886. Monk, Ramsay, Tessier, Cross, JJ.

The bailiff must sell property seized according to the advertisement, unless he be required by the plaintif to change the order of sale. *Cheney & Brunet & Chauveau.* M. Judgment reversing,

27 March, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Baby, J. diss.

La question de savoir si l'acheteur a juste sujet de craindre d'être troublé et peut demander caution en vertu de l'art. 1535 C. C., est une matière discrétionnaire, dans laquelle cette Cour sera peu disposée à déranger le jugement de la Cour de première instance.

Lorsque la Cour de première instance a condamné le vendeur à donner caution, sans limiter la durée de tel cautionnement, la Cour d'Appel reformera le jugement à cet effet. *Biron & Trahan.* M. Judgment confirming, 27 Jan., 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dissenting. Rep. M. L. R. I. Q. B. 247.

§ 25. *Of property of minor.*—A sale by a minor, emancipated by marriage, to her father and ex-tutor (without any account being rendered, but after the making of an inventory of the community existing between her father and mother) of her share in the mother's succession, said sale containing a valuation of what was coming to her from her tutor—should be considered as equivalent to an account accepted and discharge granted, and therefore, under C. C. 2258, which is applicable to such cases, the action of the pupil to annul the sale is prescribed by ten years from majority. *Grégoire & Grégoire.* M. Judgment reversing, 25 January, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk, J., dis. Rep. M. L. R. 2 Q. B. 228. 9 Leg. News 365.

La vente de meubles, faite par un commerçant, est, d'après l'art. 2260 paragraphe 5, C. C., une vente commerciale qui peut être prouvée par témoins.

L'achat de meubles d'un vendeur solvable et la donation d'iceux par l'acheteur à sa fille, l'épouse séparée de biens du vendeur, en exécution de l'obligation prise au contrat de mariage de celle-ci, sont un achat et une donation valables.

Une opposition afin de distraire à une saisie, chez le défendeur, des meubles que son épouse a ainsi acquis, doit être tenue avec dépens. *Gagnon & Carle.* Q. Judgment confirming, 7 December, 1885. Sir A. A Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 14 Rev. Leg. 164.

§ 26. *Delivery.*—Appellant sold to respondents a quantity of tea to arrive. The tea arrived promptly and was placed in a warehouse to the order of respondents. It seems the tea was all in the warehouse on the 14th October. On the afternoon of the 15th, by a letter dated the 14th, respondents notified the Appellant that the tea had arrived too late, and that respondents would not take the tea, unless Appellant was prepared to alter the terms of payment. This Appellant immediately refused to do, and directed the warehouseman not to deliver without being paid in cash. Respondent without withdrawing their refusal to take the tea, in Appellant's absence demanded a sample, which was refused. Respondents then wrote to Appellant to say that the transaction was at an end, Appellant having failed to carry out his part of the bargain Appellant then sold the tea, after notifying Respondents, and sued for the loss by the second sale. *Held,* reversing the judgment of the Court below, that it was Respondents who failed to carry out the bargain, that they never having withdrawn their letter of the 15th, Appellant was justified in directing the warehouseman not to deliver without payment in cash, and that Appellant had a right to sell the tea after notifying Respondents, on the best terms he could get. *Cox & Turner et al.* M. Judgment reversing, 25 September, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ.

§ 27. *Warranty.*—The vendor of a house is obliged to warrant the purchaser from loss owing to the drains being in a bad state, and not in accordance with the municipal by-laws, provided such purchaser was not aware of the defect at the time of sale. *Ibbotson & Ouimet.* M. Judgment reversing, 21 Dec., 1876. Sir A. A. Dorion, C. J.,

Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 53.

A vendor who sells a property during the proceedings of expropriation for a public improvement is not *garant* of the purchaser for the share of the cost of the improvement with which the property is charged. by an assessment roll subsequent to the date of the sale. And this holds good even where the assessment roll referred to was prepared under the authority of an Act of the Legislature, to take the place of the original assessment roll for the same improvement, made *previous* to the sale, but which has been declared null by the Courts,—there being nothing in the Act to give a retroactive effect to the new assessment roll, or to reserve to the actual owner of a property any recourse against those from whom he had derived his title after the improvement had been made.

The vendors, by a clause of the deed of sale, relinquished and waived any right to exact interest on the unpaid balance until the net revenues of the company,purchaser,should be sufficient to pay the annual liabilities of the company for interest, insurance, etc., in connection with a certain loan, after which they would be entitled to receive interest to the extent of seven per cent. out of the surplus of revenue, according to its sufficiency ;—*Held.* that the true meaning of this stipulation was that the purchaser should pay no interest on the balance due, during the extension of time granted for the payment of the balance, unless the net revenue of the property should be sufficient to pay the charges for interest, insurance, etc., not merely that the claim for interest should be postponed. *Cross & The Windsor Co.*, M. Judgment reversing, 25 September, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. M. L. R. II. Q. B. 8. 4 Dec. d'A. 280.

§ 28. *Simulated.* — It is not fraud for a father to purchase the furniture belonging to the husband of his daughter for her protection, and to leave her in possession of it in the common habitation of the family, and a purchase of this sort gives rise to no presumption of simulation. *Johnston & Scott.* M. Judgment confirming, 20 September, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ.

L'Intimé qui a acheté une terre de son beau-frère Scott, à la charge de payer les dettes de celui-ci, l'a fait dans le but de venir en aide à Scott, et que cette transaction n'est nullement entachée de dol. *Blouin & Brunelle.* M. Judgment confirming, 20 Nov., 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 58.

Nullity of deed.—Hypothec. — L'annulation d'une vente ou donation d'un immeuble, pour cause de fraude, n'atteint pas l'hypothèque consentie à un tiers de bonne foi, lorsque l'emprunteur possède le dit immeuble en vertu de titres parfaits à leur face et n'indiquant aucun signe apparent de nullité. *Normandin et les Religieuses Carmélites d'Hochelaga.* M. Judgment confirming 21 Dec., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 329.

§ 29. *By Agent.*—One Henry Aylmer, junr., having been authorized by power of attorney to sell a mill and several lots of land belonging to the Respondent, sold the whole to Appellant in payment of his own debts. The present action was instituted by Respondent to have that sale set aside.

Held:—That although Henry Aylmer, junr., was authorized to sell Respondent's property, he could not do so to pay his own debts, and that the sale to the Appellant was properly set aside. *Maher & Aylmer.* M. Judgment confirming, 21 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 106.

A party employed as agent to sell property cannot accept in payment his own indebtedness, and a sale for the consideration of the release of his own liability will be set aside as fraudulent. *Maher & Aylmer.* M. Judgment, 21 December, 1880. Sir A. A. Dorion, C. J.,

Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 106.

A principal who agrees to pay a commission to an agent for the sale of his manufactured goods, stipulating at the same time that the agent shall cease to manufacture the same article as he had previously done, and who secretly undersells his agents, cannot complain that the agent has not used due diligence, and therefore that he can refuse to pay him his commission on the goods the agent did sell. *The Joseph Hall Manufacturing Co. & McDougall.* M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

A general agent authorized to purchase goods for his principal binds his principal for the price, although the agent may have been in funds to pay for these. *Poulin & Williams.* Judgment confirming that of Sup. Ct., 15 June, 1877. Dorion C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The principal who profits by a purchase made for his account by his agent, or clerk, is liable to the vendor, although at the time of the sale the vendor was ignorant of the fact that the agent was not the principal. *Côté & Paquet.* Q. Judgment confirming, 7 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. *Read & Birks*, 2 L. C. J. 161. *Ducasse & Beaugil*, 13 L. C. R. 13.

An agent purchased cattle as for himself, the owner not knowing he was transacting with an agent. The ostensible purchaser could not pay, and the vendor learned he was the buyer for Appellant, that he had no business of his own except that of a buyer for Appellant, and that Appellant got the cattle and only settled with the ostensible purchaser by an account, which appeared to be that which might pass between a principle and agent, and which Appellant did not produce. *Held*, that the seller of the cattle had no recourse against the Appellant. Q. Judgment reversing, 6 Dec., 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Baby, JJ., dissenting thought the course of business, between the ostensible purchaser and Appellant to which this transaction was not an exception, was that between a principal and agent, that McShane got the cattle directly and had not proved he paid for them.

The power of an agent to sell on commission may be revoked at any time, subject to the rights of the agent. *Dillon et al. & Borthwick.* Judgment confirming that of Superior Court, 15 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Where the power of an agent is revoked before delivery, a sale begun cannot be completed by the agent, unless there has been an acceptance by the purchaser which binds him. *Lynn & Niven.* M. Judgment reversing, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

The power of the agent may be revoked at any time by the principal.

The agent who alleges a sale cannot prove it without a memorandum in writing. *Lynn & Cochrane et al.* Judgment reversing, those of the Superior Court and Court of Review, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ.

§ 30. *Possession.*— A purchaser by licitation cannot take possession of the property purchased, but must demand possession by lawful process. *Hus & Millette et al.* M. Judgment confirming, 21 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 9 Rev. Leg. 56.

SALVAGE. — A steamship carrying passengers and a valuable cargo, from Liverpool to Montreal, having lost her screw, and having been six days under sail, was in the Gulf of St Lawrence near a dangerous coast, and exposed to peril.

An agreement made by the captain to pay £800 sterling for towage into Gaspé Harbor (a distance of about 50 miles) should be enforced, seeing that

the service might properly be treated as salvage, and as such was worth at least the sum fixed by the agreement. *Stewart & Brewis* M. Judgment confirming, 20 June, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 26 J. 14. 4 Leg. News 203. 1 Dec. d'A. 319.

SCHOOL COMMISSIONERS. — *Illegal election.*—A school commissioner illegally elected may abandon the office, and he is not obliged to wait till he is sued. Such resignation for an illegal election renders the office vacant and the Lieutenant Governor can appoint. *Laliberté & Reed.* Q. Judgment rendered at Montreal, 20 June, 1876, reversing. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, Sicotte, JJ.

A school commissioner is not a municipal officer within the meaning of Art. 1033 C. C. P. *Sauvé & Boileau.* M. Judgment, 24 January, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 134.

Election.—It is necessary that five electors should demand a poll, in the case of the election of a school commissioner.

Where an election of school commissioner has been held under circumstances which are unusual and which lead the Court to believe that there has been a surprise of the electors, and that they have been debarred from exercising their right to vote, the election will be annulled. *Sauvé & Boileau.* M. Judgment reversing, 20 September, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 6 Leg. News 257.

Fabrique School.—Quo Warranto.—A building erected by the voluntary subscription of inhabitants of the parish of Beauport, but on the ground and with the permission of the *Fabrique*, and used as the school-house of the parish, and since 1847 in possession of the school-commissioners as school-house of the first *arrondissement*, still remains the property of the *Fabrique*.

An agreement made between the school-commissioners and *curé*, acting in the name, but without the express authorization of the *Fabrique*, who nevertheless acquiesce therein, stipulating that the school-house in question belongs to the *Fabrique*, that its occupation by the commissioners is worth $60, *per annum*, and that the commissioners will only have the right to engage one teacher chosen by the *curé*, is valid in so far as to entitle the *curé* and *marguillier en charge* to be school-commissioners, and that the last clause, although invalid as contrary to public order, does not annul the entire contract, but must be treated as unwritten.

In parishes where there are no schools belonging to the *Fabrique*, it is permissible for the *Fabrique*, with the consent of the school-commissioners, to contribute $60 to the funds of the latter, and that by so doing the *curé* and church warden in office become *ipso facto* school-commissioners. *Villeneuve & Charest.* Q. Judgment confirming, 3 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 8 Q. L. R. 230, 1 Dec. d'A. 235.

En 1872 et 1873, les Commissaires d'Ecoles de la paroisse de Laprairie ont fait construire une maison d'école supérieure et prélevé sur les contribuables une somme de $3,000. Cette somme n'ayant pas suffi pour défrayer le coût de la bâtisse, les Appelants, avec l'autorisation du Surintendant de l'Education, ont imposé une taxe additionnelle de 30 cents par $100, se montant en tout à une autre somme de $3,000.

Jugé:—Que les Commissaires n'ayant le droit de prélever qu'une somme de $3,000 pour la construction d'une école modèle, cette seconde taxe de $3,000 était illégale et *ultrà vires* *Les Commissaires d'Ecoles du village de Laprairie & Brosseau et al.* M. Judgment confirming, 24 September, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 4 Dec. d'A. 42.

An action by the Superintendant of Education does not lie under s. 22 of

40 Vict., c. 22 (Q.) against the secretary-treasurer of a school municipality after he has rendered his account and the account has been approved at a regular meeting of the rate payers and also by the trustees.

Even supposing that the action by the Superintendant in this case could be regarded as an action instituted under sect. 36 of the above mentioned act and sect. 19 of 41 Vict., c. 6, the action would not lie until after the trustees had been put in default to bring such action, and had refused or neglected to do so. *Ouimet & Normandin.* M. Judgment confirming, 19 November, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 107; 8 Leg. News 11.

A statute (41 Vic., c. 6 Q.) subjecting the difficulties between School Commissioners and their Secretary-Treasurer to an arbitrary adjustment by the Superintendant, is retroactive and will bind a Secretary-Treasurer whose functions have ceased before the passing of the statute in question. The presence of the Commissioners is not necessary at the examination of the accounts. *Pineau & Rimouski.* Q. Judgment confirming, 7 May, 1884. Monk, Ramsay, Cross, Baby, JJ. Ramsay, J. dissenting, thinks an act of the sort is not an act of procedure, and therefore is not presumed to have a retroactive effect; and that the commissioners must be present or regularly summoned.

The examination of the accounts of a Secretary Treasurer, in case of difficulties between him and the Commissioners, at a meeting irregularly convoked, and where only two of the Commissioners are present, is equivalent to an examination "in presence of the commissioners in regular meeting assembled and of the secretary treasurer duly summoned to appear at the said examination" etc., 41 Vic., c. 6, sect. 16. *Les Commissaires d'Ecoles de Rimouski & Grondin.* Q. Judgment reversing, 7 May, 1884. Monk, Ramsay, Cross, Baby, JJ. Ramsay, J. dissenting.

Par la loi de l'instruction publique de cette province, les recours des commissaires d'école contre un Secrétaire-Trésorier en charge, ou sorti de charge, sont définis et limités aux cas prévus par la section 36 du statut de Québec. 40 Vict, ch. 22 et par les sections 16 et 19 du statut de Québec, 41 Vict., ch. 6, que la dite section 16 de l'acte en dernier lieu mentionné permet le recours par voie d'arbitrage devant le Surintendant, auquel toute juridiction est donnée en la matière, et que les autres dispositions n'admettent l'action civil devant les tribunaux que sur l'initiative du surintendant qui peut la porter lui-même, après avoir mis les commissaires d'école en demeure d'exercer ce recours eux-mêmes, et, à leur défaut de le faire, après telle mise en demeure; et que les commissaires d'école qui n'ont pas été mis en demeure par le surintendant, de porter une action contre un secrétaire-trésorier sortant de charge sont incompétents pour se porter demandeurs dans une telle instance. *Commissaires d'Ecole de Kamouraska & Langlois.* Q. Judgment confirming, 7 December, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 11 Q. L. R. 379, 14 Rev. Leg. 145.

The secretary treasurer of school commissioners being unable to cash a a government's cheque given to him for school purposes, handed it to the chairman of the commissioners to be cashed. The money was lost by the chairman or stolen from him. *Held,* that the secretary treasurer was not liable for the amount, as he had taken reasonable care of the cheque and was in no way in fault. *Ouimet & Verville.* Q. Judgment confirming, 4 Dec., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, Rep. 7 Q. L. R. 34, 1 Dec. d'A. 66.

SCHOOL TAXES.—In a suit between rate payers and school Commissioners. the fact that the rate payers are dissentients and the organization of a corporation of dissentient school trustees may be proved by verbal testimony. where it is evident by receipts for school taxes granted by such dissen-

tient corporation in favor of such rate payers, during a series of years, and by other circumstances, that such a corporation has de facto existed, and claimed payment of school taxes in that capacity during many years. *The School Commissioners of Roxton & Boston et al.* M. Judgment confirming, 17 December, 1879. Reported 24 Jurist 122. 3 Leg. News 20.

SCIERE FACIAS. — It is only under and by virtue of a writ of *sciere facias*, that letters patent by the Crown making a concession of lands can be set aside. *Pacaud & Rickaby.* Q. Judgment confirming, 7 Sep., 1875. Rep. 1 Q. L. R. 245.

SEA.—Where the master of a ship contends that the destruction of cargo was due to the perils of the sea he must prove it, or he will be held liable in damages for the loss. *Hearle & James et al.* M. Judgment reversing, December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

SEAMEN'S ACT, 1873 (CANADA).—Le Juge des Sessions de la Paix a juridiction sommaire contre ceux qui commettent l'offense de monter, *étant armés*, sans permission et illégalement, sur un navire dans le port de Québec, en vertu de l'acte de 1873, 36 Vict., chap. 129, sect. 86.

Dans l'espèce actuelle, le bref de prohibition ayant été refusé par un juge de la Cour Supérieure, il n'y a pas lieu, par un appel à cette Cour, de reviser cet ordre.

Le requérant n'a pas montré, par des affidavits suffisants, les circonstances qui lui donnent lieu de se plaindre de la sentence et d'aucune détention en vertu de cette sentence, et que l'affidavit en termes généraux du procureur *ad litem* du requérant ne suffit pas. *Clarke & Chauveau et al.* Q. Judgment confirming, 8 February, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice and Ramsay, J. dis. 8 Q. L. R. 98. This report gives no fair idea of the issues involved in this appeal. The case is fully reported, 2 Dec. d'A. 226, and the opinions in dissent are to be found 5 Leg. News 74, 85. 11 R. Leg. 228.

SECONDES NOCES.—Under Art. 279 C. de Paris, the share of the wife in the *conquets* of the community, existing under a former marriage, if there be issue of such marriage surviving, do not fall into the community under a second marriage, and consequently the testamentary bequest to the second or later husband of all the wife's share of the second community does not convey to the said husband any share of such *conquets*. *Pilon & Brunet et al.* M. Judgment confirming, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A tripartite community of property is dissolved by the death of the second wife, if she dies without leaving any minor children, and the third share, of the second wife in an immoveable, purchased during the existence of such tripartite community, is a *propre* of the issue of such second marriage.

That the surviving husband has no right to alienate the third share of such immoveable after the death of the second wife, and the purchaser of the rights of the issue of the marriage, of age at the time of her mother's death, has a right to bring his action of *partage* of said immoveable. *Francœur & Mathieu.* M. Judgment reversing, 22 December, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 288, 8 Rev. Leg. 665.

SECRETARY TREASURER.—The Secretary Treasurer of a building Society who has left the service of the Society and handed over all his books and vouchers to the Society is entitled to a judgment discharging his security, and to radiate the hypothec on his property given as security for his faithful administration, within a delay fixed by the Court, and in default of giving such deed the judgment to stand therefore. *La Société Permanente de Construction & Longtin.* Judgment confirming, 22 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

SECRETION.—Secreting the books of an estate will not warrant an attachment. *Dallemore & Brooke.* M. Judgment confirming, 15 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 6 Rev. Leg. 657.

The Appellant gave the Bank corn for advances, by transferring the Bill of Lading under a special receipt by which the Bank was to be paid out of the proceeds. The Appellant's firm sold the corn and appropriated the money to pay another creditor.

The petitioner contended that the corn was not that of himself or of his firm—that if it was they had dealt with it as the Bank directed, and that he had personally no part in the fraud, if any, and that at most the payment was merely a preference not secreting.

The *capias* was maintained. The corn was sold as the property of Petitioner's firm, and the proceeds were funds in their hands destined to the payment of the Bank. The payment to another was a fraudulent secreting of this money, and they are liable for it as for any other funds in their hands. Their excuse is virtually, this is not secreting, it is an offense under the larceny act. It is therefore more than a mere preference. *Brown & The Canadian Bank of Commerce.* M. Judgment confirming, 27 January. 1876. Dorion, C. J., Ramsay, Sanborn, Tessier, JJ.

A payment made in the ordinary course of business, although it may be in some sense a preferential payment. does not justify a *capias*, but a preferential payment may be of such a character as to amount to a secreting, and to justify a *capias. Ferlund & Nield*, Q. Judgment confirming, 3 September, 1877. Dorion, C. J., Monk, Ramsay, McCord, JJ.

A fraudulent preference, by which assets which should be available to the creditors generally, are given to one or more is equivalent to secreting. *Galt et al. & Dussault.* M. Judgment reversing, 1 Oct., 1881. Sir A. A. Dorion, C.J., Monk, Ramsay, Cross, Baby, JJ. Monk, Cross, JJ., dis. Rep. 4 Leg. News 321.

An insolvent debtor, who without fraud, sells his property to a minor with long credit, without consulting his creditors is not liable to be arrested on *capias. Beaudette & Audette.* Q. Judgment confirming, 7 June, 1878, Dorion, Monk, Ramsay, Tessier, Cross, JJ. Monk, J., dis. Rep. 8 Rev. Leg. 581.

A *capias* against an insolvent may be maintained for secreting his property, and this charge will be sustained by evidence to show that large sums, sufficient to account for the insolvency, have been made with and not accounted for. *Downey & Winning, et al.* M. Judgment confirming, March, 1875, Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

SECURITY BOND.—Where a party became surety for an agent engaged under certain conditions, and the agent got behind in his accounts, and the employer (an insurance company) made a new arrangement with him, part of which was to cancel the amount against him, and to engage him on conditions different from those of the former agreement, the surety is discharged of his liability. *The Ætna Life Insurance Co. & Rooklidge*, M. Judgment confirming, 14 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 1 Leg. News 29.

SECURITY.—*Chose jugée.*—Le jugement rendu sans fraude contre le débiteur principal, est chose jugée contre la caution.

La caution à qui les poursuites contre le débiteur principal n'ont pas été dénoncées, n'est, comme le garant, responsable que des frais de l'exploit originaire jusqu'au rapport de l'action inclusivement, et non des frais subséquents. *Lamy & Drapeau*, Q. Judgment reversing, 7 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Q. L. R. 383. 1 Dec. d'A. 237.

Variation from terms of letter of

guarantee.—A letter of guarantee by an agent of a tanner, to the effect that, in consideration of the party to whom the letter is addressed endorsing a note for $2,000.00 in favor of the tanner he will retain in his hands the surplus funds, to the extent of $2,000.00 arising from the sales of sole leather, then coming in for sale and in process of manufacture, is binding on such agent personally, without special acceptance, and is also so binding notwithstanding that the note so endorsed should be for $22,000.00 instead of $2,000.00. *Beattie Workman*, M. Judgment confirming, 24 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 14 Jurist 15. 2 Leg. News 212.

SECURITY FOR APPEAL. — Le cautionnement fourni pour appeler d'un jugement de la Cour Supérieure est irrégulier, s'il n'a été précédé d'un avis à la partie, et que, dans ce cas l'appel doit être renvoyé. *Dorion & Dorion.* M. Judgment 27 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 3 Dec. d'A. 387.

Security in appeal from a judgment in the Insolvent Court must be put in within eight days, and where the writ has issued without the security being so put in, the appeal will be dismissed on motion. *Gibson & McArthur*, M. 20 June 1877.

Where there is a motion to dismiss appeal, on one of the sureties having become insolvent, delay will be granted Appellant to put in another surety. *Kane & McLean.* Q. Judgment 4 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The Appellant deposited bonds of the City of Montreal as security for an appeal by the Corporation of that City to the Privy Council. These bonds were held to be an insufficient security for the Corporation, and the delay was prolonged to put in security till the 4th. In Chambers, Monk, J. 2 Nov., 1876. On the 4th the Corporation deposited $1000 as security, but it appearing that this sum was insufficient, they subsequently deposited $800 additional.

Respondent then moved to be allowed to execute his judgment, on the ground that the failure of appellant to put in security within the delay of six weeks first allowed, the respondent had acquired an absolute right to execute his judgment. *The Mayor &c. of Montreal & Hubert.* M. Judgment, 6 March, 1877.

A security bond in appeal from the Circuit Court may be amended by supplying the description of the real estate on which the security justify, and which had been omitted in the bond. *The Montreal Cotton Co. & the Corporation of the Town Salaberry of Valleyfield.* M. Judgment, Appellant allowed to amend bond, 16 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 24 J. 159, 2 Leg. News 238, 9 R. Leg. 551.

A party obtaining leave to appeal from an interlocutory judgment, forfeits such right if the security by law required be not given within the delay fixed by the Court. *Buneau & McCaffrey*, Q. Judgment reversing, 8 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Q. L. R. 364. 1 Dec. d'A. 313, 11 R. Leg. 253.

SECURITY FOR COSTS. — When security for costs is given by one person the description of the real estate of the surety should be given. *Dawson & Desfosses.* Q. Judgment in favour the party moving, the appellant, 2 Sept. 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 1. Q. L. R. 121.

Under sect. 42 Ins. Act 1869, security for costs is not due because of the insolvency of the husband of Plaintiff, he being only a party to the action to authorize his wife. *Barthe & Moreau & vir.* Q. Judgment confirming, 5 June, 1875. Dorion, C.J., Monk, Taschereau, Ramsay, Sanborn, JJ.

SECURITY FOR INJUNCTION.—Where the terms of the Statute have not been

substantially followed in putting in security, the injunction will be quashed on *exception à la forme. Dobie & Gordon et al.* M. Judgment confirming, 14 December, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

SEDUCTION.—The mother of an illegitimate child may sue for the expenses of seduction for aliments for the child, and *en déclaration de paternité. Kingsborough & Pound.* Q. Judgment confirming, 5 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 4 Q. L. R. 11, 1 Leg. News 115.

SEIGNIORIAL CADASTRE.—The laws abolishing the seigniorial tenure did not require the seignior to have inscribed in the cadastre all rents due to him on lands, but only those of a seigniorial character. *Hart et al. & Trudel.* Q. Judgment reversing, 5 Dec., 1874. Monk, Taschereau, Ramsay, Sanborn, Bossé, JJ.

SEIGNIORIAL DUES.—An immoveable acquired by the Crown for a public use becomes re united to the Crown domain, and its exchange by government for another property did not revive the seigniorial rights over it, nor gives rise to indemnity for commutation under the act arranging for the commutation dues in the fief St. Augustin. Chap. 41 C. S. L. C. *Middlemiss et les Religieuses de St. Joseph.* M. Judgment reversing, 22 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 1 Leg. News 51.

The advantages accruing by the commutation of the seigniorial tenure are acquired by the actual owners of the property, and cannot be claimed by their predecessors. *Mongenais & Rochon.* M. Judgment reversing, 18 December, 1876. Monk, Ramsay, Sanborn, Tessier, JJ. Reported 7 Rev. Leg. 674.

SEIGNIORIAL INDEMNITY.—The delay prescribed by chap. 40 C. S. L. C., sect. 41, for the production of hypothecary oppositions, where the money is still in the hands of government, is no answer in the mouth of the representative of the personal debtor to a claim on the fund. *Hart et al. & David et al.* Q. Judgment confirming, 7 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 4 Q. L. R. 88.

The failure to produce within the six months of closing the cadastre of a seigniory the opposition required by sections 40 and 41 of the Seigniorial Act, is fatal, and third parties may take advantage of it. *Panet & Boisseau et al.* Q. Judgment reversing, 8 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Routhier, JJ. Rep. 5 Q. L. R. 377, 10 Rev. Leg. 163.

SEIZURE.—The seizing bailiff in a first seizure has a right to intervene in a subsequent seizure to protect the rights of the first seizure. *Graham & Lepailleur.* M. Judgment confirming, 14 December, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Seizure, under a writ of revendication ordering the attachment of timber in District of Arthabaska, by which logs in the District of St. Francis were attached, will be set aside so far as regards the logs so seized in the District of St. Francis. *Baby & Nadeau.* Q. 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Sanborn, J. dis.

SEPARATION DE CORPS.—*Services.*—*Rhéaume & Massie.* M. Judgment confirming, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J., dissenting. Rep. 5 Leg. News 298.

SEPARATION DE CORPS ET DE BIENS.—Where a motion to amend the declaration in the case is of such a nature as materially to alter the allegations and conclusions, an opportunity to answer the declaration as amended should be afforded to the Defendant, and therefore a judgment granting such motion and pronouncing finally on the merits of the case at the same time will be reversed. *Montrait & Williams.* M. Judgment reversing, 22 June, 1877.

Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Reported 22 J. 19.

SEPARATE ESTATE. — A married woman separated as to property has the legal possession of her separate estate, though in her husband's domicile. *The City of Montreal & Greene.* M. Judgment confirming, 15 May, 1879.

SEQUESTRATOR. — En vertu des articles 645 et 876 du Code de Procédure, un juge en chambre a le pouvoir de nommer un séquestre à une saisie d'immeubles, lorsque cette saisie est retardée par quelqu'opposition. *Morgan & Lord et al.* M. Judgment confirming, 28 Nov., 1882. Rep. 3 Dec. d'A. 119.

A judge of the Superior Court has power to appoint a sequestrator, *pendente lite*, in an action to remove executors under a will from office for mal-administration. *Brooke et al. & Bloomfield et al.* M. Judgment, 22 Dec., 1875. Dorion. C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 23 J. 140.

SEQUESTRE.—A judge in chambers has power to nominate a *sequestre. Morgan & Lord et al.* M. Judgment confirming, 28 November, 1882. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. 3 Dec. d'A. 119.

To effect a composition with his creditors, James Baylis gave his notes endorsed by McKeand, who, as security, took an assignment of the estate, including a property in the City of Montreal. McKeand leased this property to the Appellants James Baylis & Son, and subsequently reconveyed the property to James Baylis with the right to recover the rents accrued or to accrue. Later the Respondent was appointed sequestrator to the property in a hypothecary action by Crossley & Sons against McKeand, and he sued Appellant, to recover the rent from date of lease by McK. to the date of his appointment.

The Court expressing strong doubts as to the propriety of the appointment of a sequestrator in such a case, and reversing the Judgment of the Court below.

Held, 1o. That the transfer of rent by McKeand to Baylis did not require to be registered to enable Baylis to receive the rents.

2o. That the receipts *sous seing privé* given by Baylis to the Appellant, were *primâ facie* evidence that the rent had been paid at the date of the receipt, and that it was for the Respondent to establish the contrary. *Baylis et al. & Stanton.* M. Judgment reversing, 24 March, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 350.

SERVANT, *Dismissal of.*—Le propriétaire d'usines (dans l espèce des forges) peut renvoyer de son service avant l'expiration de son terme d'engagement le gérant de ces usines qui s'est engagé sans le consentement du propriétaire, dans une industrie rivale de la sienne, de nature à nuire au commerce de ce dernier.

Il n'est pas nécessaire, dans ce cas, de faire résilier l'engagement du gérant par les tribunaux avant de le congédier. *Macdougall & Macdougall.* Q. Judgment confirming. 3 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 11. R. Leg. 203.

An employee or servant, dismissed without cause, may sue for the instalments of his wages as they come due under the terms of his engagement; his wages being the measure of damages, unless the master shows that the employee has, or might have earned something with should be deducted from his claim. *Montreal Cotton Co. & Parham.* M. Judgment confirming, 13 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Taschereau, JJ. Rep. 23 J. 146.

A servant, who is discharged,without sufficient cause, before the expiration of the term for which he was engaged, if he sues for wages, can only claim the wages which are due at the date of the institution of the action, his recourse for the unexpired period being reserved. But, if he chooses to sue for damages for breach of contract, the length

of the unexpired term of his engagement may be taken into consideration in estimating the damages. *Beauchemin et al. & Simon.* M. Judgment, 21 December, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dissenting. Reported 23. J. 143. 1 Leg. News 40. 9 Rev. Leg. 640.

Of Corporation.—Dismissal.—Extra work.—When a medical man has been employed by the City as a Health Officer, at a fixed annual salary, and attendance at the Civil Smallpox Hospital has been added to his ordinary duties, without stipulation by him for additional salary, he cannot legally recover from the City any amount which the Council may have voted by way of remuneration for such extra services.

The City could not dismiss a salaried employee, whose term of office had been renewed for another year by tacit reconduction, without paying him his salary to the end of the current term so renewed. And that in the present instance the term of office of Dr. Dugdale had been renewed by tacit reconduction for another year, when the City dispensed with his further services. *The City of Montreal & Dugdale & Dugdale & The City of Montreal.* M. Judgment reversing, 15 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Tessier, JJ., dissenting. Reported 25. J. 149.

The engagement of a clerk on a salary as travelling agent, to be engaged particularly in purchasing in the European markets, *held*, not to prevent his employers from using his time otherwise, so long as the occupation is not derogatory to his position in society. *Provost et al. & Gauthier.* M. Judgment reversing, 14 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 1. Leg. News 289.

To justify the summary dismissal of a servant or clerk for disobedience it is necessary to establish the act of disobedience and to show that it was disobedience to one, the clerk or servant had notice was in a position of authority. *McArthur et al. & Riddell.* M. Judgment confirming, 14 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

SERVICE OF ACTION.—*v.* PROCEDURE.

SERVITUDE.—" A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor." 499 C. C.

" It arises either from the natural position of the property, or from the law, or it is established by the act of man." 500 C. C.

" Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man.—The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land." 501 C. C.

Water.—The action *en démolition de nouvel œuvre* lies against the owner of land on a lower level of a stream, who has built a dam so as to obstruct the flow from a higher level, and thus weaken the power which has been previously used by the owner of the upper level to propel his machinery.

The fact that the work complained of has been completed does not affect the right of action for its demolition.

The Consolidated Statute L. C. Cap. 51, which provides that proprietors of lands may improve water courses adjoining them, and may erect dam, etc., but shall pay damages, to be ascertained by experts, which result from such works to others, does not apply to the case where the owner of the upper level already has works in operation, and does not deprive him of the *action en démolition. Fréchette & La Cie. Manufacturière de St-Hyacinthe.* M. Judgment confirming, 23 September, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 5. Leg. News 187. 1 Dec. d'A. 378.

This decision was reversed in the Privy Council in so for as regards proof of the

fact that the appellant had obstructed the flow of water. (1).

The proprietors of inferior lands on a stream have an action of damages against the proprietor of the superior lands for any interference with the flow of water which aggravates the servitude to which the inferior lands are subject. *Cournoyer, Poulet et al., vs. Guevremont.* M. Judment confirming 23 September, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier J. dissenting. Reported 7 Leg. News 308.

A proprietor who, with the permission of the Corporation of a city, has constructed a drain under the street to connect his property with the public sewer, has the exclusive ownership and possession of such drain; and the right, although not a servitude thereby establi-hed in his favour, entitles him to exercise the *action négatoire* to prevent others from using the drain, unless they contribute to the costs. *Toupin & The Ontario Bank.* M. Judgment reversing, 21 Sep. 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn JJ. Monk, Sanborn JJ., dis. Rep. 20 J. 5.

Right of way.—Action en complainte.—Defendant pleads that he has a right of way by a deed in the following terms: " De laisser passer et repasser " les dits vendeurs.....sur le lopin de " terre premièrement désigné, tant a " pied qu'en voiture pour communi- " quer au terrain restant aux dits ven- " deurs du côté nord de la rivière, un " chemin libre aussi sur le terrain du " côté nord de la dite rivière pour la " commodité des dits vendeurs pour " aller de leur terrain à la dite rivière " abreuver en tout temps leurs ani- " maux." *Held* by the Superior Court: " That the Defendant and his predecessors have been in the enjoyment of a right of passage over the land of the plaintiff described in the declaration in this cause for a period of about forty years, that at the time mentioned in the declaration in this cause, the Plaintiff had undertaken to make a fence by which the defendant was excluded from the road he had so enjoyed, and that the Defendant, in what he did, merely claimed his right of passage, and by no means called in question the Plaintiff's title or possession to any part of the land described in the said declaration, and that the Plaintiff was in no way disturbed by the Defendant in the possession or property of the said land." *Hardy & Roy.* Q. Judgment confirming, 3 March, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

A road opened and frequented by the public as such without obstruction, during ten years becomes a public road. *Myrand & Legaré.* Q. Judgment confirming 3 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported. 6 Q. L. R. 120.

The following clause is sufficiently precise to form a title to a servitude: " Le droit de passer et repasser tant à pied qu'en voiture, en toutes saisons, par le chemin actuel du vendeur tant sur le front que sur la profondeur de la terre du dit vendeur dont l'arpent ci-dessus vendu fait partie." *Bernier & Gaumond.* Q. Judgment confirming, Dec.. 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Taschereau, Ramsay, JJ., dis. thought the title should have described fully the property over which this servitude was to be exercised.

The following stipulation is sufficiently explicit and precise to establish a right of passage: " Que les dits Jacques " Poulin, père et fils, et leurs succes- " seurs à perpétuité, auraient le droit " de passer et repasser sur la terre du " dit Jean-Baptiste Turcotte, située en " la dite paroisse Ste. Famille de l'Ile " d'Orléans, contenant trois arpents de " front, bornée au nord au fleuve St- " Laurent, au sud au trait-quarré, au " nord-est et au sud-ouest par les dits " Jacques Poulin, père et fils, par *un* " *chemin de charrette*, depuis le chemin " du roi à aller à la grève, *par le chemin* " *ordinaire*, et à pied sur la terre qui

(1) See appendix.

" fricherait en aucun endroit que ce " fût—et droit de passer par le travers " de la dite terre pour communiquer à " leur terre du sud-ouest, ainsi qu'à " celle du nord-est *par le chemin ordi-* " *naire*, et qu'au nord du dit chemin du " roi, les dits Jacques Poulin, père et fils, " leurs hoirs et ayans cause, auraient le " droit, à perpétuité, de passer et re " passer sur et traverser la terre du dit " Jean-Baptiste Turcotte dans l'endroit " appelé communément *le désert*, au " sud du premier bois, par un chemin " de charrette usité et dont ils avaient " coutume de se servir, et que dans le " cas où le dit désert serait ensemencé, " les dits Jacques Poulin, père et fils, " et leurs successeurs à perpétuité, au- " raient le droit de passer au nord du " dit désert, au bord du premier bois, " par un sentier de pied pour y con- " duire et faire passer leurs animaux." *Poulin & Turcotte.* Q. Judgment con firming, 5 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Taschereau, J., dis.

Title to servitude.—This case turns on the terms of a deed and its interpretation under the evidence of use. *Tétu & Gibb et al.* Q. Judgment reversing, 7 March, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J., dissenting. Reported 5 Q. L. R. 172, 10 Rev. Leg. 483.

Non ædificandi. — The following clause in a deed of sale of real property creates a servitude *non ædificandi*, in favor of the vendor's neighbouring property:— " Il est encore entendu que toute bâtisse qu'érigera le dit acquéreur sur le dit terrain, sera en ligne avec celle du dit vendeur." And, that a subsequent purchaser of the property is thereby prevented from building beyond the said line. And, should he so build, the Court will order the demolition of that part of the building projecting beyond said line. *Hamilton & Wall.* M. Judgment reversing, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 24 J. 49.

Servitude claimed on alleged error in title. *Fuller & Anderson et at.* M. Judgment confirming, June, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Bélanger, JJ. Ramsay, J., dis.

All servitudes of a seigniorial character were abolished by the Seigniorial Act of 1854, whether they be principal rights or only accessory to the right of *banalité.*

If the servitude was not seigniorial, it was, at any rate, created in favour of a seigniory, and, that realty disappearing, the servitude ceased to exist. *Mondelet et al. & Roy.* M. Judgment confirming, 20 Nov., 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R., 1 Q. B. 9, 7 Leg. News 352.

For the purpose of extending the water-works the corporation of the City of Montreal required two pieces of land adjoining the house of the late Mr. Moffatt and on his property. In making the said works the corporation made a deep cutting so as to endanger the rest of Mr. Moffat's property. In order to prevent this damage the corporation agreed to build a wall, which being in need of repair the representative of Mr. Moffatt called on the corporation to repair. This the corporation neglected to do, although put *en demeure* so to do, and the Respondent had the work done, and now seeks to be paid the amount expended in reparing the wall. *Held*, Respondent's claim was not based on a servitude, and that the building of the wall implied the obligation to repair. *The City of Montreal & Moffat.* M. Judgment confirming, 22 March, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

As regards servitudes, the destination made by the proprietor is equivalent to a title, only when it is in writing, and the nature, the extent and the situation of the servitude specified. C. C. 551.

The use and extent of a servitude are determined according to the title which constitutes it; so, where E. acquired four houses " with the ser- " vitudes of hidden drains underneath " the yards," and it appeared that a

drain had been constructed to conduct the sewage of the four houses in question as well as of the adjoining corner house, to the street drain, it was held that the deed did not give any right of servitude in the portion of the drain under the yard of the adjoining corner house, this not being mentioned in the deed, and not being included in the description given therein. *Fisher & Evans.* M. Judgment reversing, 25 September, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 415, 4 Dec. d'A. 264.

Le propriétaire d'un fonds en culture en vendant deux lots détachés de ce fonds avait établi une servitude de passage à pied et en voiture en faveur de ces lots sur une autre partie du dit fonds, avec stipulation portant que les barrières fussent tenues fermées. Sur l'un des lots ainsi cédés une raffinerie d'huile de charbon, et sur l'autre un abattoir, furent subséquemment érigés, et pour l'exploitation de ces deux industries les propriétaires des fonds dominants firent passer journellement un grand nombre de bestiaux et voitures par le dit passage, de telle sorte que les barrières étaient toujours ouvertes.

Jugé:—Que dans les circonstances il y avait aggravation de la servitude aux termes de l'art. 558 C. C., et que le propriétaire du fonds servant était bien fondé à demander des dommages pour l'abus du droit de passage, et une défense pour l'avenir de s'en servir pour l'exploitation des dites industries. *Mc Millan & Hedge.* M. Judgment confirming, 20 May, 1885. Sir A. A. Dorion, C. J., Ramsay, Cross, JJ., dissenting. Rep. M. L. R. I. Q. B., 376, 4 Dec. d'A. 269.

Where the Plaintiff's wall is not plumb, but leans over his neighbour's land and the neighbour also builds a wall which following the inclination of Plaintiff's wall, is raised above it, and is terminated so as to make it appear plumb, an action will be dismissed which claims indemnity from the builder of the second wall. *Quinn & Leduc.* M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 6 Leg. News 287.

SET OFF.—*v.* COMPENSATION.

SHARES.—A mandamus will not lie to compel a company to transfer shares of its stock to a subscriber who has not signed an acceptance of such shares. *Hart & The Montreal Manufacturing Co.* Judgment confirming, 14 Dec., 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The production of a certificate of the Secretary of a joint stock company that the Defendant had subscribed five shares of the company is *prima facie* evidence of the fact, under the terms of the statute 37 Vic. c. 94 Sec. 5. *The Stadacona Fire Insurance Co & Cabana.* M. Judgment reversing, 6 March, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Tessier, JJ., dissenting. Reported 2 Dec. d'A. 380.

A purchaser, *subsequently to* incorporation, of shares subscribed *prior* to incorporation, and who has paid a call after his purchase, is estopped from contesting the validité of the original subscription. *Macdougall et al & The Union Navigation Co.* M. Judgment confirming, 16 March, 1877. Monk, Sanborn, Tessier, JJ. Rep. 21 J. 63.

SHAREHOLDER.—Where a person has subcribed for shares in the capital stock of a company which is being organized, and has assumed the position of a shareholder, and has paid a portion of the calls made from time to time on stock, he cannot set up alleged irregularities in the original organization of the company as a valid reason for avoiding payment of the remainder of the calls. *The Windsor Hotel Co. & Lewis et al.* M. Judgment reversing, 29 Sep., 1881. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, Baby JJ. Rep. 26 J. 29, 4 Leg. News 331.

Those persons only who are mentioned in the letters patent incorporating the company as shareholders and pro-

moters prior to that time, if not mentioned therein, are not liable as contributories. *Ruscony & La Compagnie de Navigation Union.* M. Judgment reversing, 18 Sep., 1878. Sir A. A. Dorion C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 133. 1 Leg. News 494.

An agreement between a promoter of a company and a subscriber for shares, that the latter shall pay for his stock in services, will not bind the company.

Even if the shares of those who subscribed before the respondent were reduced, without his knowledge, after he subscribed, yet if he, after obtaining knowledge of that fact, did not immediately repudiate his stock, but, on the contrary, paid a first instalment thereon, and took an active part, both as solicitor and shareholder, in promoting the affairs of the company, he will be liable to pay the calls on the stock held by him as they are made by the Directors. *The National Insurance & Hatton.* M. Judgment reversing, 21 June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross JJ. Rep. 24 J. 26, 2 Leg. News 238.

It is no answer to an action for calls, on subscribed stock of a joint-stock company to say that the Defendant was given to understand by those who solicited him to become a shareholder that he would pay for his stock in supplies to the company. *Christin & The Union Navigation Co.* M. Judgment confirming, 20 November, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A bank took 150 shares of stock of the nominal value of $100 per share, on which 45 per cent, was paid up, as collateral security for advances. *Held,* the Bank was not responsible for calls on shares so held. *The Railway & Newspaper Advertising Co. & The Molsons Bank.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 207.

Where a shareholder has transferred stock not fully paid to a solvent party, all the calls then due being paid, and the transfer has been acquiesced in by the company, the original stock holder cannot afterwards be called upon to make good the remaining calls. *Ross et al & Baribault.* Q. Judgment confirming, 7 May, 1888. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ.

Respondant was sued for the amount of his subscription to the stock of a company to be formed. The undertaking was in this form:

"The undersigned hereby respect-
"ively agree to take the number of
"shares of one hundred dollars each in
"the capital stock of a company to be
"formed, under the name of the Ma-
"gog Textile & Print Company, herein
"below set after our names respective-
"ly, and to pay the amount of all calls
"thereon, at the office of the company
"in Montreal, at such times as the
"Provisional Director or the Directors
"of the company when incorporated
"may direct."

In the subsequent proceedings, the promoters of this company, excluded Respondent, were themselves constituted the company "with all others who may become shareholders"; and they made different arrangements of an important kind affecting the capital of the company without the privity or consent of Respondent. *Held,* that the Respondent was not obliged to take the stock at the suit of the company, subsequently formed, under the above undertaking. *The Magog Textile and Print Company & Dobell.* Q. Judgment confirming, 7 October, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier. Baby, JJ. Rep. 9 Leg. News 348.

The Appellant signed an undertaking to take stock in a company to be incorporated by Letters Patent under Q. 31 Vict., c. 25, but was not a petitioner for the Letters Patent, nor was his name included in the list of intending shareholders in the schedule sent to the Provincial Secretary with the petition. The Appelant's name was not

mentioned in the Letters Patent incorporating the company, nor did he become a shareholder at any time after its incorporation.

Held. 1st. That the Appellant never became a shareholder of the company, and could not be held for calls on stock.

2nd. *The Union Navigation Co. & Couillard* (7 R. L. 215 & 21 J. 71) *and Rascony & the same Co.* (1 Leg. News, 494 & 24 J. 133) followed and approved. *McDougall et al. & the same Co.* (21 J. 63) distinguished.

3rd. (Per Tessier, J.)—That a subscription to stock in a company to be incorporated is a mere proposition and not a binding promise to take and pay.

4th. (Per Ramsay, J.)—That under the terms of the Statute 31, Vict., Q. c. 25, the only persons who are shareholders in a company incorporated thereunder are those named in the Letters-Patent as such, and those who become members after incorporation. *Arless & Belmont Manufacturing Co.* M. Judgment reversing, 21 May, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Cross, J., dissenting. Rep. M. L. R. 1 Q. B. 340. 4 Dec. d'A. 233.

SHERIFF.— *Security bond by.* — Le cautionnement fourni par un shérif en vertu des dispositions du chapitre 92 des Status Refondus du Bas Canada, n'est pas nul, parce qu'il n'aurait pas eté fait en double, qu'il aurait été reçu par le protonotaire, en l'absence du juge, qu'aucun avis en aurait été donné, avant de le donner, au Procureur-Général, et que les cautions n'auraient pas justifié sous serment de leur solvabilité. *St. Laurent et ux & Blais et al.* Q. Judgment reversing, 3 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J. dis. Rep. 11 Leg. News 272.

If a bond be given personally to the Sheriff, it is for the promissor to show that it was an official bond and that it should not pass into the estate of the Sheriff deceased. *Dawson & Ogden.* Q. Judgment confirming, 4 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An obligation taken by a Sheriff from an *adjudicataire* by which the latter promised to pay the Sheriff the amount of the purchase money with interest, is against public order, and the laws regulating the office of Sheriff, and is null. *Bérard & Mathieu.* Judgment reversing, 22 September, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 234.

The Sheriff is not liable in damages to one indicted as a felon, for the extra expense caused to the latter in his defence, by a defect in the summoning of the jury, the array having been successfully challenged by the accused. *Danois & Bossé.* Q. Judgment confirming, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

SHERIFF'S SALE.—Appellants purchased at Sheriff's sale a piece of land thus described : "Toute cette étendue de terre située à l'endroit appelé La Canardière, dans la seigneurie de Notre-Dame des Neiges, dans la paroisse de St. Roch Nord de Québec, *contenant une superficie d'environ cinquante arpents plus ou moins,* étant divisée en deux lots par le chemin de la reine qui conduit à Beauport, et bornée en front au sud par la rivière St. Laurent, en arrière au nord par la propriété de l'Asile des Aliénés de Québec, à l'est par l'autre propriété du dit James Douglas vendue à la Compagnie de prêt et de dépôt du Canada et Michel Guillaulaume Baby conjointement, et à l'ouest par la propriété du Séminaire de Québec, avec les bâtisses sus érigées, circonstances et dépendances, ce lot étant la partie-Ouest de chacun des numéros 588, 589 donnés sur le plan de la paroisse de St. Roch du Nord de Québec et le livre de renvoi d'icelui fait par le commissaire des terres de la Couronne."

To this petition, Respondent demurred and the demurrer was maintained on the following grounds :

" Considering that under Art. 708 of

the Code of Procedure, the adjudication to the petitioners in this cause was made without warranty as to the contents of the immoveable sold ;

Considering that the contents of the said immoveable is to be measured by French and not by English measure,and that the sale thereof was of a certain determinate thing within certain limits and bounds." *The Seminary of Quebec & Douglas.* Q. Judgment confirming, 8 March, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay and Tessier, JJ. dis.

A sale purporting to be by the Sheriff, but really being proceedings in a District where the Sheriff had no authority, is bad. *Perkins & Rye.* M. Judgment reversing, 22 June 1876. Monk, Ramsay, Tessier, Sicotte, Bélanger, JJ.

A Sheriff's sale of lands may be set aside where it appears that the whole transaction was got up for the purpose of purging the land so sold of the hypothec with which it was charged. *Bourque & Bissonnette.* M. Judgment reversing, 29 Sep., 1881.

A sale by the Sheriff of Montreal, at his own office, of land situate in the Parish of l'Enfant Jésus, a duly erected Parish for all civil purposes formed out of the Parish of Montreal, is illegal, null and void, and that such sale could only be legally effected at the church door of the Parish of l'Enfant Jésus.

Such nullity can be invoked by a hypothecary creditor by petition, without a writ of summons, duly served on all the parties interested. (Art. 715 C. of C. P.)

Such nullity may also be invoked by means of an opposition filed after the sale and served on all the interested parties, and containing all the essential allegation of a petition *en nullité de décret. Fauteux & The Montreal Loan & Mortgage Company.* M. Judgment reversing, 21 December, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 22 J. 282. 2 Leg. News 15.

" Where a lot of land sold at sheriff's " sale was described in the minutes of " seizure and in the advertisements as " having a two story wooden house " thereon erected, while in fact the " house in question was erected partly " on the lot sold and partly on the ad- " joining lot, and it was proved, more- " over, that the purchaser would not " have bought if he had been aware of " the error, the sale will be vacated at " the suit of the purchaser on the " ground of misdescription."

" An error in the minutes of seizure " as to the contents of an immoveable " bearing a cadastral number will not " alone support a demand by the pur- " chaser to have the sale vacated on " the ground of misdescription, even " where a lot only 30 feet frontage was " described as of 45 feet frontage.' *La Compagnie de Prêt et Crédit Foncier & Baker et al.* M. Judgment confirming, 16 Septembre, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 45, 2 Leg. News 349.

SHERIFF'S TITLE.—The title given by a Sheriff may be declared faux. And although it may have been registered and the title have passed to an innocent holder, the faux may be declared on the demand of an hypothecary creditor, whose hypothec was omitted in the Sheriff's title. *Carpenter & Dery.* Q. Judgment, 2 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 5 Q. L. R. 311. 8 Rev. Leg. 283.

Sheriff's return subject to inscription en faux.—An opposing creditor may inscribe en faux against the return of the Sheriff which avers that he received the price of adjudication, while in fact the adjudicataire and the sheriff had agreed to substitute for the real payment of the price a private claim, in which the adjudicataire and his family were interested, against the sheriff who was insolvent. *La Société de Construction Permanente & Martin.* Q. Judgment reversing, 7 September, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, McCord, JJ. Reported 10 Rev. Leg. 619.

SHERIFF'S FEES FOR KEEP OF PRISONERS.—Under the 39 Vic, c. 11, the sheriff can only recover from the corporation of Quebec, the keep of prisoners convicted under the vagrant act, and in any case of imprisonment for contravention of a by-law. *Alleyn & The Corporation of Quebec.* Q. Judgment confirming, 7 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

SHIPPING. — A vessel charged for mooring at a wharf is not liable for wharfage of cargo, and there is no wharfage due for goods not landed on the wharf. There is no special custom of the port of Quebec proved. *Forrest & Berensten.* Q. Judgment confirming, 4 Dec., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

It is for the Master at his diligence to establish the contribution for a general average ; and where he has not done so, he cannot demand the deposit of a sum of money arbitrarily fixed by him as the probable amount of the contribution before delivering the goods, but must be satisfied with a sufficient security bond. *Pearson & Wurtele.* Judgment confirming that of Superior Court, 5 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

General.—The consignee has a right to demand delivery of his goods on furnishing a sufficient bond to cover his contribution to a general average unadjusted notwithstanding Art. 2566. C. C., and the master cannot insist on the deposit of a specific sum of money before delivery. *Pearson & Wurtele et al.* Judgment confirming, 5 June 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, McCord JJ.

Charter party.—A charter-party of a vessel at sea was to be cancelled if the vessel was not ready to receive cargo on the 10th August. She only came to her berth a little before six in the evening of the 10th, and was not ready to receive cargo, and did not in effect receive any. *Held*, that the lessee was justified in not carrying out the charter-party. *Paterson & Knight.* Judgment confirming, 6 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

By Art. 2408 C. C., the sub-lessor of a ship is liable as if he were owner. *Hoddart et al. & Gosset.* Judgment confirming, 19 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Sanborn, J. dis.

Damages for delay to furnish cargo.—Demurrage.—A charter-party was entered into, by which a steamer was to take on board a cargo of coal, at the port of Sydney, Cape Breton. In the charter party was this stipulation : " Taking her turn with other steamers, and taking precedence of sailing vessels, and receive prompt despatch in loading and unloading. " Sydney is a coaling port, and the coal is brought straight from the pit to the vessels loading. There were a number of vessels waiting to load, and the steamer did not get her cargo until seventeen days after the captain protested the freighters. *Held*, that it was for the shipowner to establish want of diligence, and that there being no delay attributable to the master or crew, or except what was occasioned by the custom of the port, the shipowner was not entitled to damages by way of demurrage. *Lord & Elliot et al.* M. Judgment reversing, 21 March, 1882. Monk, Ramsay, Cross, Baby, JJ. Cross, J., dissenting. Rep. 5 Leg. News 124. 2 Dec. d'A. 337.

NOTE.—This judgment was reversed in the Privy Council. (1)

The Appellant, in January, 1879, agreed to charter a steamship for the carriage of live cattle to England, and the conditions of the charter-party were that the steamship should proceed to Montreal with all convenient speed to arrive there " between " the opening of navigation in 1879, and thereafter to run regularly between Montreal and London, and to be dispatched from Montreal in regular rotation with other steamers to be chartered up to 1st October, 1879. Navigation opened at Mont-

(1) See Appendix.

real about 1st May, but the steamship did not arrive there until 5th June, when the Appellant refused to load.

There was not a substantial compliance with the contract on the part of the ship, and that the Appellant was entitled to throw up the charter-party. *McShane & Henderson et al.* M. Judgment reversing, 27 May, 1884. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R. 1 Q. B. 264.

NOTA.—Similar judgments were rendered in *McShane & Milburn* and *McShane & Hall et al.*, in which cases the ships arrived respectively, May 17 and May 18. Rep. M. L. R. II Q. B. 42.

The stipulation in a charter-party, that the vessel shall be loaded with all despatch, is to be interpreted as meaning according to the custom of the port, which in this case was that the vessels should be loaded in their due turn, as reported.

There was evidence that by the custom of the port extra large vessels were loaded by tender ; *held*, that the lighters of such vessels were entitled to be loaded whenever they came into port as though the vessel herself were there; more specially as the lighters were only taking "bunker" coal for the vessel there were attending, *i. e.*, coal for consumption, which by the regulations of the port had precedence over coal for cargo. *Lord et al. & Dunkerly.* M. Judgment reversing, 26 February, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Tessier, J. dis. Rep. 7 Leg. News 102.

Where the charter party stipulates that a vessel shall load in turn subject to the " regulations of the international coal and railway company " and it appears that it is due of their regulations that steamers shall have precedence to take " bunker " coal, that is coal for their own use in navigating, any loss of time in giving such precedence, will not give rise to demurrage. *Allan & Carbray et al.* Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The purchaser of a cargo of coal is liable in damages for the demurrage incurred by the ship, owing to the purchasers not being ready to receive the coal according to the rate at which it should be delivered. *Brow & Hart et al.* M. Judgment confirming, 14 June, 1879 Sir A. A. Dorion, C. J., Monk. Ramsay, Tessier, Cross, JJ.

Where a loss takes place by collision for which Defendants are responsible, it is no answer to the suit by the shipper that he has been paid by the Insurance Company.

A man in charge of a barge navigating the waters of the St. Lawrence, as captain, is not presumed to have the highest amount of nautical skill.

If notice was required under the circumstances, notice to the company whose steamer did the damage on the day after the accident is sufficient. The duty of the captain of the barge was to use all case in preserving the cargo. *The Richelieu & Ontario Navigation Company & Lafrenière et al.* Judgment confirming, 14 June, 1879. Dorion, C. J., Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 204.

Le capitaine d'un navire a droit d'action pour recouvrer le fret de la cargaison délivrée au port de destination, quoique la marchandise ait été partiellement endommagée en la débarquant.

Le recours du consignataire peut être en dommages, soit par exception. soit par demande incidente, pour recouvrer le dommage souffert. *Halcrow & Lemesurier.* Q. Judgment reforming. 7 October, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 10 Q. L. R. 239.

Damages to shipping. — Stress of weather. — Mooring. — Allen et al. & The Quebec Warehouse Company et e contra. Q. Judgment confirming, 8 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ.

The captain of a barge navigating inland waters will not be held liable for

not having the highest nautical skill. *The Richelieu and Ontario Navigation Co. & Lafrenière et al.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Sicotte, Ramsay, Tessier, JJ. Rep. 2 Leg. News 204.

STORAGE.—The master of a ship is liable to the shipper for bad storage by which goods are damaged. M. Judgment, December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

SIGNATURE.—*v.* RECEIPT.—The signature to a writing, which is denied, cannot be proved solely by comparison of the disputed signature with other signatures which are admitted or proved to be genuine.

Quære, as to the effect of illegal evidence taken without objection. *Paige & Ponton.* M. Judgment confirming, 19 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 26 J. 155.

Lorsque la signature portée au bas d'un billet n'est pas suffisamment prouvée être celle du prétendu signataire, après négation sous serment de la part de celui-ci, l'action en réclamation du paiement du dit billet sera renvoyée. *Boulanger & Walters.* Q. Judgment reversing, 6 May, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, Cross, JJ. dis. Rep. 14 Rev. Leg. 359.

SIGNIFICATION OF TRANSFER.—Non-signification of transfer of the claim sued on must be pleaded; and therefore where the Defendant allowed judgment to be obtained *ex parte*, it was held that he could not raise the question of non-signification in appeal. *Stanley & Honlon.* M. Judgment confirming, 22 December, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 75.

Acceptance of.—In the case of an assignment with the consent of the mortgagor, containing a covenant by the assignor to transfer to the assignee as collateral security a policy of insurance then held by the assignor on the buildings existing on the property mortgaged, that the failure by the assignee to secure such transfer, and the consequent reception by the assignor of the insurance money under the policy, would not entitle the mortgagor to claim from the assignee the discharge of the mortgage. *Robert & Macdonald.* M. Judgment confirming, 22 December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 90.

SIMULATED DEED.—*Prescription of ten years.*—La prescription de dix ans ne s'applique pas à une demande en résiliation ou résolution d'un acte simulé.

Celui qui a été partie à un acte simulé peut en demander la résiliation, lors même qu'il l'aurait consenti avec l'intention de frauder ses créanciers, si cette fraude n'est pas en tout ou en partie la cause ou considération de la convention entre les parties. *Dorion & Dorion & e contra.* M. Judgment confirming, 31 October, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Dec. d'A. 376.

SLANDER.—Although the presumption of reconciliation in a case of slander is, as a general rule, favorably received, it is not so where the slanders complained of are atrocious, and dictated apparently by persistent malice, and in such case the evidence must be clear to establish the presumption of condonation. In this case, the evidence appears to the majority of the Court to be wholly insufficient. *Veilleux & Lanouette.* Q Judgment reversing, 7 Dec., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice, dis. Rep. 5 Leg. News 419.

In an action of damages for slander, a plea of justification, and not in mitigation of damages, will be rejected on demurrer. *Moquin & Brossard.* M. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Plaintiff appealed thinking damages insufficient. Appeal dismissed. *Mack & Welsh.* M. Judgment confirming, 29

November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Action of damages for slandering the professional reputation of a medical practitioner. The Court thought the damages excessive and reduced the amount. *Reed & Levi.* Q. Judgment, 5 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J., dissenting as to reduction.

NOTE.—The Supreme Court reversed this judgment and *held:* "In an action of damages, if the amount awarded in the Court of first instance is not such as to shock the sense of justice and to make it apparent that there was error or partiality on the part of the judge (the exercice of a discretion on his part being in the nature of the case required), an appellate court will not interfere with the discretion such judge has exercised in determining the amount of damages." 6 Sup. Ct. Rep. 482. In spite of the elaboration of this holding, this case lays down no new principle. Courts of Appeal are not presumed to reverse judgments, except when there is error, and actions of damages stand precisely on the same footing in this respect as other cases

Where injurious words are used in anger on a sudden heat, small amends will suffice if promptly tendered. *Mack & Welch.* M. Judgment confirming, 29 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Privileged communication.—Notice. —Where a municipal councillor uses words injurious to the character of the Secretary-Treasurer of the municipality in the discharge of his duty, without malice, the communication is privileged. *Cloutier & Blackbean.* Q. Judgment reversing, 7 Dec., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 420.

A person qualified to vote at the election of a school trustee may at the time of the election fairly discuss the conduct of a trustee seeking re-election, and may indicate irregularities committed by him in the discharge of his duties as such trustee but he is not permitted to qualify such irregularities as being dishonest. *Powell & Waters.* Q. Judgment reversing, 7 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, Cross, JJ., dissenting. Reported 8 Rev. Leg. 656.

By words spoken in the pulpit.— While ministers of religion are amenable to the civil tribunals for slanderous expressions uttered by them from the pulpit or elsewhere, an action of damages for slander will not be sustained against a priest for admonishing his congregation, on pain of being deprived of the sacraments, not to go near the shop of certain people in the parish who were in the habit of scoffing at religion—where no injury was proved, and it did not appear that the words were spoken maliciously or with intention to injure any particular individual, though they were generally understood by the congregation to apply to the plaintiff. *Blanchard & Richer.* M. Judgment confirming, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Sanborn, J., dis. Rep. 20 J. 146.

Slander by a priest.—Brossoit & Turcotte. M. Judgment amending, June 1875.

Where the conduct of the Plaintiff is of a very provocatory character and no real damages are suffered by Plaintiff the Court may dismiss Plaintiff's action. *Leclerc & Bizier.* Q. Judgment confirming, 5 Dec. 1874. Dorion, C. J., Monk. Taschereau, Ramsay, Sanborn JJ. Rep. 6 Rev. Leg. 269.

SMOKE.—While the local legislatures have no jurisdiction to deal with an indictable misdemeanour, that being a matter of criminal law assigned exclusively to the Parliament of Canada, they have authority to legislate for the prohibition of things hurtful to public health, not matter for indictment at common law, such as factory chimneys "sending forth smoke in such quantity as to be a nuisance." The local legislatures possesses this power as coming under "municipal institutions," under

B. N. A. Act, S. 92, No. 8; and the fact that a term of the criminal laws ("nuisance") is used in a local act to characterize an offense within the jurisdiction of the local legislature does not make the enactment *ultra vires* when the offense is not *per se* an indictable offense under the criminal law. *Pilow et al. & Mousseau, Att. Gen.* M. Judgment confirming, 27 January, 1885. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. M. L. R. I. Q. B. 401. 14 Rev. Leg. 252.

SNOW.—A proprietor is liable in damages for snow falling from the roof of his house, where it had been negligently left to accumulate, and by which a horse was frightened and ran on, overturning defendant's carriage and injuring him personally. *Dawson et al. & Trestler.* M. Judgment confirming, 16th Dec., 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Monk, Ramsay, JJ., dis. Rep. 5 Leg. News 114. 2 Dec. d'A. 115.

SOCIETY.—*v.* CORPORATION, BUILDING SOCIETY, &c.

SOLATIUM. — Damages may be recovered for physical and mental suffering caused by a wound inflicted by Defendant, where there was only negligence. *Pelletier & Bernier.* Q. Judgment confirming, 6 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Monk, J., dis. Rep. 3 Q. L. R. 94, and 9 Rev. Leg. 338.

Following *Ravary and G. T. R.*, 6 J., 49. A direction to the jury that anguish of mind suffered for the loss of a husband may properly be taken into consideration by them in estimating the damages which should be allowed to the widow, is not erroneous. (1) *Robinson & The Canadian Pacific Railway Co.* M. Judgment reversing, 16 Jan., 1886. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. M. L. R. II. Q. B. 25, 9 Leg. News 85, 4 Dec. d'A. 297.

(1) This judgment has been since over ruled by the Supreme Court. *v.* APPENDIX.

Under the law of this Province a father has an action of damages against the wrongdoer for the death of his child, caused by the fault of the Defendant. And it will be no answer to such action to say that the child was too young for his services to be of any value, and that he was only a source of expense to the parents at the time. *Lord & La Compagnie du Chemin de Fer du Nord.* Q. Judgment confirming, 5 February, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 297.

SPECIAL POWER UNDER STATUTE. —A Railway Company being embarrassed obtained an act of Parliament, authorizing an arrangement with creditors for debts due up to a certain date. This was on the proviso that the company should, within three months obtain the consent of three-fourths of the English and three-fourths of their American creditors to this arrangement. It was admitted that the requisite consent of the English creditors had been obtained. There was no admission or evidence that any such consent within three months had been obtained, but it appears that from time to time almost the whole of the creditors had individually accepted the terms. This was deemed a sufficient compliance with the terms of the Statute. *McDonald & The Grand Trunk Railway Co.* M. Judgment confirming, 13 March, 1781. Dorion, C. J., Monk, Ramsay, Tessier, Taschereau, JJ. Ramsay, J., dissenting.

SPECIFIC PERFORMANCE.—*Obligation to take Deed.*—Where a vendor seeks to enforce the sale of a lot of land, and tenders a deed to the purchaser differing in several unimportant particulars from the acknowledged conditions of sale, the Court may vary and reduce the conditions sought to be imposed, and may order a deed to be executed, pursuant to the precise conditions of sale.

An adjudication at auction on conditions signed by the purchaser completes the sale as between the parties; and where there is a stipulation that a

deed shall be executed within ten days after a sale by auction, the failure of the vendor to tender a deed before the expiration of the delay does not *ipso facto* resolve the sale.

A stipulation in the conditions of sale by auction that the vendor shall be entitled to proceed to *folle enchère* if the purchaser makes default does not restrict the vendor's recourse to that remedy or exclude other actions. *Ligget et al. & Tracey.* M. Judgment 31 Dec., 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 20 J. 313.

STAMPS.—Action on a note on which the stamp was insufficient in amount, and the stamp was incorrectly cancelled. The defect was only noticed in appeal. On motion of the respondent in appeal he was permitted to correct the irregularity. *Cimon & Thompson.* Q. Judgment, 3 June, 1880. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 194.

Where inadvertently a party failed to affix a stamp to a legal document, on an affidavit of his good faith, he will be permitted to affix the required stamps, on paying a penalty, which the Court fixed at ten cents. *Leduc & McCarthey.* Q. Judgment, Badgley, Monk, Taschereau, Ramsay, JJ.

v. FURNISS & SOPER. Sep., 1875.—An action on an unstamped *bon* will be dismissed, with costs, even where the Defendant has not pleaded the fact. *Hudon & Girouard.* M. Judgment, 16 Sep. 1875. Dorion, C. J., Monk, Trschereau, Ramsay, Sanborn, JJ. Rep. 21 J. 15.

STATUTE OF FRAUDE.—Art. 1235 C. C.—*Interrogatories.* — Interrogatories *sur faits et articles* may be taken *pro confessis*, without any motion to that effect.

Interrogatories so taken *pro confessis*, when they furnish sufficient *commencement de preuve par écrit* may supply the want of the memorandum in writing required by art. 1235 of our Civil Code.

Is the sale of a horse to a private person, not a dealer in horses, a commercial contract? *Cox & Patton.* M. Judgment, 20 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Loranger, J., dis. Rep. 18 J. 316.

V. Nicholls & Haas. M. Judgment confirming, Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

STATUTORY PRIVILEGE TO BUILD A TOLL BRIDGE.—A number of persons living in the neighbourhood of this toll-bridge agreed to build a bridge in common in order to avoid paying toll. *Held*, that this was a violation of the statutory privilege. *Girard & Bélanger et al.* M. Judgment reversing, Sep., 1874. Monk, Taschereau, Ramsay, Sanborn, Loranger, JJ.

STEAMER.—*Supplies to.* — *v.* MERCHANT SHIPPING ACT.

STOCK-HOLDER.—*v.* CORPORATIONS—JOINT STOCK COMPANIES, &c.

STORAGE.—*v.* SHIPPING CASES.

STREET RAILWAYS.—A street Railway Company authorized by statute (24 Vict., c. 84) to construct a track upon and along the highways in the parish of Montreal, leading into the streets of the City "and to use and "occupy any and such parts of any of "the streets or highways aforesaid as "may be required for the purpose of "their railway track, and the laying of "the rails and the running of their cars "and carriages," exceeds its powers by laying the track on one side of a highway, within six feet from the line of the adjoining property, the value of which was thereby greatly diminished. Where a right of passage is given it should be exercised *ex æquo et bono*, in accordance with the use and destination of the highway, so as to cause as little inconvenience as possible (compatible with the exercise of the privilege) to the public, and the adjoining proprietors. And, in the present case the track should have been constructed on the part of the highway used by vehicles,

and not on one side thereof used by persons on foot, and where the running of the cars interfered with access to the adjoining property.

Neither the trustees of the Montreal Turnpike roads, nor the municipality of the parish, had any right to authorize the laying of the track of the railway on one side of the highway, so as unnecessarily to injure the adjacent property. *Ross & City Passenger Railway Co.* M. Judgment reversing, 16 Sept., 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 60.

STREETS. — A corporation having power from the legislature to alter the pavements from wood to stone, is not obliged to enter on this alteration simultaneously.

The by-law was sufficiently precise although it did not state the width of the flatstone work in each street. *Bain & The City of Montreal.* M. Judgment confirming, 19 January, 1882. Sir A. A, Dorion, C. J., Ramsay, Tessier, Cross. Baby, JJ. Rep. 5 Leg. News 71, 2 Dec. d'A. 221.

The corporation of Quebec having opened a hole in the street for certain repairs, or allowed it to be opened, is not responsible in damages to a person driving into the hole, which was not protected and no light kept burning at night, if the party was driving at the rate of eight miles an hour. *Gray & Mayor &c. of Quebec.* Judgment confirming. 5 June, 1871. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Ramsay. J., dis., said that to make contributory negligence two things were necessary. 1st there must be negligence. 2nd the negligence, must contribute to the accident. He did not think that driving at eight miles an hour was negligence, and it was not proved nor rendered probable that Appellant's carriage falling into a hole made in the middle of the road, would have been less, had it been going at the rate of six miles an hour.

Special power being granted to a railway company to perform certain works within the limits of a municipal corporation, and in the exercise of such powers, injury is done to a proprietor by interfering unnecessarily with the street leading to his house, such proprietor will have no action against the municipal corporation, but must seek his remedy against the company. *Corporation of Three Rivers & Lambert.* Q. Judgment confirming, 5 June, 1880. Dorion, C. J., Monk. Ramsay, Tessier, Cross, JJ. Tessier, J. dis. Rep. 10 Rev. Leg. 359.

SUBROGATION.—An hypothecary creditor may pay off the claim of a prior hypothecary creditor even after the sale of the property hypothecated to the party having the later claim. *Brunnet dit Letang.* M. Judgment confirming, 24 March, 1882. Monk, Ramsay, Cross, Baby, JJ.

A *caution* who pays the debt which he had guaranteed is subrogated *de plein droit* in the rights of the creditor.

A debtor who pays his own debt with borrowed money may subsequently make a valid transfer of the debt, without fraud, and he is not prevented from so doing by article 1155 C. C. *Renny et al. & Moat.* Judgment confirming, 22 March, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J. dis. Rep. 2 Leg. News 97. Confirmed in Privy Council. (1)

A special mortgagee, third in rank, obtaining legal subrogation in the rights of a general mortgagee, first in rank, covering the same and other property, would not be allowed to use his recourse so as to defeat the equities of a second mortgagee. if the mortgagee first in rank was amply secured on the other property affected by it ; but in the present case, the Respondents, having bought from the firm of Sternberg & Co., a certain property hypothecated to the Royal Institution for the Advancement of Learning, for a certain sum of money, and having obtained

(1) *See* APPENDIX.

by paying this sum to the Royal Institution a legal subrogation against Appellant, vendor to Sternberg & Co., who had undertaken in his deed of sale of the said property to Sternberg & Co., to discharge it from said hypothec, was entitled to recover this amount from the Appellant, although he had failed to claim payment of his first mortgage on the property affected by the three mortgages. *Saunders & The Commercial Mutual Building Co.* M. Judgment confirming, 24 March, 1883. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 141.

By two deeds of obligation the owner of certain real estate was charged in favour of Brunet with the payment of two sums amounting to $6,737 for which the real estate in question was hypothecated. The proprietor sold a portion of this real estate to Bénard. The Society respondent was the creditor of Benard for $2,417.06, for which sum Respondent obtained judgment, and enregistered this judgment against the real estate in question. Respondent then tendered to Appellant the full amount of his claim, and demanded to be subrogated in his rights. The Respondent refused to accept this offer or to give the subrogation required because Benard was insolvent before the tender and demand of subrogation, and that the only portion of land in which the Respondent had an hypothec, had passed into the hands of an assignee and been sold, and that Appellant had been collocated for a portion of his debt, and that the hypothec of so much of the land had ceased to exist. *L'Etang & The Société de Construction.*

NOTE.—The case of *L'Etang & The Société de Construction* does not turn on 1156 C. C. but on general principle. *v.* INTEREST.

The Respondent paid to the Appellant a debt due by M. *et al.*, and took a subrogation of the claim. He sued M., and the Appellant had knowledge of the action and furnished the names of witnesses to prove the debt; but the Respondent obtained judgment for part only. *Held*, that Respondent was entitled to recover the balance from Appellant, but as he had not called Appellant in as garant, Respondent was not entitled to recover the costs incurred in the suit against M. *Carreau & McGinnis.* M. Judgment reversing, 8 November, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, Baby, JJ., dissenting. Reported 3 Leg. News 362, 1 Dec. d A. 12.

SUBROGATION DE DROIT. — An insurance company which has paid the amount of a policy, by reason of a fire caused by the fault of a third party, is not *subrogée de droit* in the rights of the insured. *The British America Insurance Co. & The Quebec Gas Co.* Q. Judgment confirming, 7 Dec., 1873, Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

The transfer to another of a certain sum of money to be paid out of a debt due to the transferor without *garantie*, and without the transferee having paid any portion of the debt due to the transferror, is not a subrogation, but a simple transfer without warranty; and, in case of execution and sale of the property hypothecated for the security of the original debt, the transferor and transferee will rank together *au marc la livre* on the proceeds of the sale. In the division of money proceeds of such a sale the transferee of interest has no right to rank before the transferor, article 1159 C. C. applying only to imputation of payments between the debtor and creditor. *Villeneuve & Graham.* M. Judgment reversing, 24 November. 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Reported 1 Dec. d'A. 61.

Where the cautions solidaires pay the debt they are subrogated in the rights of the creditor *de plein droit*, and they may without fraud cede their rights to another. *Renny et al. & Moat.* M. Judgment confirming, 22 March, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J., dissenting. Reported 1 Leg. News 97.

Redpath sold land to Appellants for $23,856, of which $3,856 was paid at execution of deed, and $20,000 was to be paid in ten years. Redpath gave the balance to the Royal Institution. The Royal Institution transferred to Cunningham. Respondent exchanged the land sold by Redpath with Burland for another property. Burland was to pay the Redpath debt and hypothecated the land acquired by him for its payment. Burland then sold to Ross and others, who also undertook to pay the Redpath debt. The Respondent, intervene, accepted the new purchasers and discharged Burland personally, but without discharging any hypothecs they might have. Cunningham then sued the Respondents hypothecarily for part of the money and interest. The Respondents paid and sued Burland. *Held*, confirming the decision of the Superior Court that Appellants were still the *garants* of Respondents, although they had given a personal discharge to Burland. *Reford et al. & The Seminary of St. Sulpice.* M. Judgment confirming, 24 December, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J., dissented on the principle that the suit against Appellants created a circuit of actions which would ultimately bring Burland face to face with the Plaintiffs. Rep. 3 Dec. d'A. 1, 6 Leg. News 27.

SUBSTITUTION.—A testamentary bequest by which a testatrix willed, that her property should be equally divided, among her children, save one of them, who was excluded, giving them *usufruit et jouissance* during their life-time and bequeathing the property of the same property to their heirs as her heirs should enjoy and have them by law, and giving moreover to her children who should take the bequest and who had children to dispose in favour of one or of several of their said children, the property of the share of which the *usufruit* bequeathed respectively to each, is a substitution.

Such substitution must be registered to preserve the rights of the *appelés*, and the wife of one of the *grevés*, creditor of his succession for the amount of her dower, may invoke such failure to register. *Morasse & Baby et al.* Q. Judgment reversing, 7 Sep., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 7 Q. L. R. 162.

Registration.—Mme Labonté by petitory action seeks to recover lands forming part of the substituted property. Appellant pleads that he bought at Sheriff's sale under a judgment by an hypothecary creditor prior to the registration of the substitution. The Plaintiff Respondent answers that the Appellant was tutor, that he delayed to register and therefore he cannot profit by his negligence. There was no allegation or proof that Appellant knew of the will or the substitution, and in absence of such allegation and proof his title was declared to be good. *Terrien & Labonté et ux.* M. Judgment reversing, 16 December, 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, J., dissenting. Reported 2 Dec. d'A. 90.

Radiation d'hypothèque.— Substitution created by contract of marriage not registered; sale of real estate by the *grevé*. Subsequently, the *cessionnaires* of the *appelés* registered.—*Held* that the representatives of the purchasers from the *grevé* were entitled to have the registration cancelled. *Labelle et al. & Ridley et al.* M. Judgment confirming, 20 Jan., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Renewal of Registration of.—The renewal of registration of any real right required by art. 2172 of the Civil Code has reference only to the hypothecs or charges on real property, and not to rights in or to the property itself. *La Banque du Peuple & Laporte.* M Judgment confirming, 21 Sept., 1874. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ. Monk, Ramsay, JJ., dis.

The holder of property by particular title, whether gratuitous or onerous, in good faith, may invoke the non-registration of the substitution affecting the property. Arts. 939 and 940 C. C. *Terrien & Labonté*, M. Judgment reversing, 16 December, 1881. Monk, Ramsay,

Tessier, Cross, Baby, JJ. Reported 2 Dec. d'A. 94.

The failure to insinuate a deed creating a substitution does not preclude the *appelé* from claiming the property from an *adjudicataire* at Sheriff's sale, the property having been sold over the head of the usufructuary. *Lavigne & McNider.* M. Judgment confirming, 2 June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J., dis.

The sale of land by this *grevé* of the soil of the substituted property is illegal, and the party purchasing the land may be called on to pay for it by the *appelé* after the opening of the substitution. *Bulmer et al. & Dufresne et al.* Judgment confirming, 22 June, 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Ramsay, Cross, JJ., dis. Rep. 1 Leg. News 302. Confirmed in the Supreme Court.

Sale of property substituted.—Land purchased by the *grevé de substitution* with monies arising out of the redemption of a constituted rent which belongs to the substitution, takes the place in all respects of the constituted rent, so much so, that the *appelés* to the substitution have a right to the land or its value, and not merely to the value of the constituded rent. *Guy et al. & Guy et al.* M. Judgment reforming, 22 December, 1877. Reported 22 J. 213. 1 Leg. News 52.

Défense d'aliéner.— La prohibition d'aliéner contenue dans une donation d'un immeuble fait par le père à son fils dans le contrat de mariage de ce dernier, *à la charge de ne pouvoir vendre, céder, échanger, ni autrement aliéner le dit immeuble sans exprès consentement et par écrit du donateur,* comprend en termes exprès, toute aliénation par vente, cession, échange ou autrement, et qu'en vertu des articles 972 et 975 du Code Civil une telle prohibition faite sans restriction est censée s'étendre à toutes aliénations, soit par acte entrevifs ou à cause de mort, et doit être interprêtée comme constituant un droit de retour en faveur du donateur.

Le défaut d'enregistrement d'une donation comportant prohibition d'aliéner ne peut priver le donateur du droit de retour en sa faveur, résultant de l'article 630 du Code Civil, le donataire ne peut conférer aucun droit sur la propriété au préjudice du donateur. sans avoir lui-même fait enregistrer son titre d'acquisition. *Pepin & Courchêne.* M. Judgment confirming, 22 Sept., 1879. Sir A. A. Dorion, C. J., Monk. Ramsay, Tessier, Cross, JJ. Reported 10 Rev. Leg. 77. 2 Leg. News 397.

Where by will a substitution is created and the testamentary executor is charged to place the capital in one or other investment specified, and he fails to do so, but places the money in a bank at interest, he will be condemned to place the money as required in the name of the substitution, and to pay the interest to the *grevé*; but the *grevé* has no right to demand that the capital shall be paid to her owing to the failure of the testamentary executor to comply with the obligations of the will. *Bourret et al. & Hurtubise et vir.* M. Judgment reversing, 22 December, 1876. Dorion, C. J., Monk. Ramsay, Sanborn, Tessier, JJ. Monk, J. dissenting.

Where a legacy is qualified as a *usufruit*, but is accompanied by a legacy of the property to the same legatee in favour of other children to be born to take place after the death of the children of the testator, it is a substitution.

Such a bequest to the three children of the testator by one clause is nevertheless divisible among the children. in such manner that at the death of one of them his own children will take his share. *Deseve & Deseve.* M. Judgment reversing, June 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Monk, Taschereau, JJ. dis.

Folle Enchère.—Execution and sale of immoveable property,—adjudication to Jean *alias* Josué Corriveau, who did not pay the price of adjudication. Petition for sale at the *folle enchère* of *adjudicataire.* Petition *en nullité de*

décrêt by *adjudicataire*, on the ground that there was a substitution on the property and that he was the *grevé*. It also appears that the *grevé* had sold the property to Plaintiff and was her *garant*. In the meantime the lands were resold. *Held*, in the Superior Court that notwithstanding the fact that the *adjudicataire* was the *garant* of the seizing creditor, he had bought without reserve, and that he had a right to have the *décrêt* declared null; and that the petition for sale at his *folle enchère* should have been dismissed, and that Corriveau was not obliged to pay the difference between the price of the first and of the second adjudications. These judgments were reversed in Appeal, the judgment reversing ordered to be signified to Corriveau, and record returned to the Superior Court, in order to compel Corriveau to *rapporter* the difference. *Pouliot et ux. & Corriveau.* Q. Judgment reversing, 7 Dec., 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ.

The *appelés* to a substitution have an interest to intervene and may intervene in a suit by the *grevé* against a trustee of the substitution, appointed by the will creating the substitution, for waste and maladministration.

Having an interest to intervene the party may urge any grounds to maintain his rights, whether the *grevé* urges them or not. Art. 154 C. C. P.

The *appelés* being minors their intervention cannot be rejected because they are represented by a tutor *ad hoc*, they having no other tutor. There is nothing to limit the office of tutor *ad hoc* to the case of article 269 C. C. Article 264 C. C. indicates that there are other cases where a tutor to a part of the property of the minor can be named, or to his person only. These then are all special tutors or tutors *ad hoc*. *Larue ès-qualité & Rattray.* Q. Judgment reversing, 7 October, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ. dis., 9 Leg. News 356.

Un grevé de substitution possède à titre de propriétaire et peut comme tel faire assurer la propriété qu'il possède, et que la déclaration qu'il aurait pu faire à la compagnie d'assurance avant d'effectuer son contrat, qu'il était propriétaire, n'est pas une fausse déclaration.

Lorsque une compagnie d'assurance assure une maison, une cuisine d'été et un hangar avec tout le ménage, "*contenu dans la dite maison*," et lorsqu'il y a des meubles qui de leur nature doivent se trouver dans le hangar v. g. le charbon, l'assurance couvre tous les meubles de l'assuré, même ceux qui étaient dans la maison et qui auraient été transporté dans la cuisine d'été ou le hangar.

Lorsqu'une compagnie d'assurance consent à un arbitrage pour faire déter miner le montant des dommages souffert par l'assuré, elle renonce par là même à son droit d'invoquer toute cause de déchéance connue par elle avant la nomination des arbitres. *La Compagnie d'Assurance Mutuelle contre le feu de la Cité de Montréal & Villeneuve.* M. Judgment confirming, 22 March, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. M. L. R. II, Q. B. 89, 4 Dec. d'A. 376. 9 Leg. News 146.

Le curateur à une substitution n'a aucun droit de recevoir les capitaux appartenant à cette substitution, et dont il doit être fait emploi conformément à l'article 931 du Code Civil.

Un tel curateur n'a pas non plus le droit de réclamer les intérêts de ces sommes capitales, ces intérêts étant dûs aux grevés de substitution.

L'Appelant n'ayant reçu les deniers appartenant à la dite substitution que comme procureur des grevés, et simple *negotiorum gestor* il n'était pas tenu de payer les intérêts des intérêts des sommes par lui reçues, si ce n'est depuis la demande qui en a été faite par l'intervention produite par l'Intimé; l'obligation de payer les intérêts des intérêts n'incombant qu'à ceux qui re-

çoivent des deniers pour des incapables.

En vertu des articles 2250 et 2270 du C. C., les intérêts échus avant le 1er août, 1866, date de la mise en force du Code, ne se prescrivent que par trente ans, et que ceux échus depuis cette date, et dont la prescription n'a commencé à courir que depuis la mise en force du Code, se prescrivent par cinq ans. *Dorion & Dorion.* M. Judgment reversing, 26 May, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Ramsay, J. dissenting. Rep. M. L. R. I Q. B. 483. 4 Dec. d'A. 213.

SUCCESSION.—*Acceptance in bar of dower.—Error of law.*—Heirs joined in a deed of sale of an immoveable pertaining to the succession of their father, during his lifetime, without the wife having renounced her dower thereon. *Held*, that this immoveable would have been subject to dower if the heirs had renounced the succession, but the fact that the heirs joined in the deed of sale first mentioned was equivalent to a declaration of their acceptance of the succession and excluded their rights to customary dower. *Betournay & Moquin et al.* M. Judgment reversing, 19 Jan., 1882. Sir A. A. Dorion, C. J. Monk, Ramsay, Cross, Baby, JJ. Reported 5 Leg. News 327. 2 Dec. d'A. 187.

Acceptance.—Fraud.—The acceptance of a succession by a person who is of age is not binding when such acceptance was the result of fraud.

In the circumstances of this case there was fraud. *Ayotte & Boucher et al.* Q. Judgment confirming, 5 Oct., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. The Chief Justice and Ramsay, J dis. Rep. 5 Leg. News 26. 8 Q. L. R. 327. 3 Dec. d'A. 123.

SUPERINTENDENT OF EDUCATION.—The superintendant of education has a right to decide under certain circumstances where a school house is to be built; and it is not a valid reason for refusing to obey his order that the land then in their possession and on which they were ordered to build it belonged to the church. *Delisle & The School Commissioners of St. Jean.* Q. Judgment reversing, 7 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross. JJ. Rep. 1 Q. L. R. 322. 1 Dec. d'A. 93.

SUPPLEMENTARY OATH.—The Court may defer the supplementary oath to either of the parties, in order to complete the proof necessary for the decision of the cause, when some proof has been made of the demand or exception. (1214 C. C.)

And where it is proved that Plaintiff was to build a barn for Defendant, and to charge him for work and material furnished, and also that the work was done, there is *some* proof of the demand, and therefore the judge, in his delaration, may defer the oath to the Plaintiff to complete the proof of special charges. *Hogle & Lambkin.* M. Judgment confirming, December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

On a contestation as to indebtedness of Defendant on an account composed of many items, mostly of trifling amounts, judgment was rendered for the amount admitted by Defendants plea ($225), the evidence only establishing $224.13, and costs of contestation against Plaintiff. In Review the Court was of opinion that the Defendant was in bad faith and deferred the supplementary oath to the Plaintiff, who established thereby an indebtedness of $228.98, for which the Court of Review gave judgment and all costs. The Court of Queen's Bench held that there was no reason disclosed to impute bad faith to Defendant, who had admitted her indebtedness to within a trifling sum of all that plaintiff claimed or could establish, with the advantage of his own oath, and that under the circumstances the supplementary oath was improperly deferred to plaintiff. *Daly & Crevier.* M. Judgment reversing, 15 February, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 82.

SUPPLIES TO STEAMBOAT FOR INLAND NAVIGATION.—There is no privilege in favour of the party furnishing supplies to a steamboat during the season of navigation of the year, and not for the last voyage. *Owens et al & The Union Bank of Lower Canada.* M. Judgment confirming, 3 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

SUPREME COURT.—Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction, now or hereafter established in any Province of Canada, in cases in which the Court of original jurisdiction is a Superior Court; Provided that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars; and the right to appeal in civil cases given by this Act, shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases, and cases of *mandamus, habeas corpus,* or municipal by-laws, as hereinafter provided. Supreme Court Act, C. 38 Vic. cap. 11.

It is the amount demanded and not the amount awarded which regulates the right of appeal to the Supreme Court, although section 17 of the Supreme Court Act is in these words: "No appeal shall be allowed in the Province of Quebec, in any case wherein the sum or value of the matter in dispute does not amount to $2,000. *The Grand Trunk Railway Co. & Godbout.* Q. 8 September, 1877. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ., Monk and Tessier, JJ. dis. Rep. 3 Q. L. R. 346.

Per curiam.—Les requérants Mills *et al.* demandent la permission d'appeler à la Cour Suprême. Ils font valoir qu'il s'agit d'une rente foncière et annuelle de $36, et qu'à raison de la nature de leur créance et de leurs droits futurs l'appel devrait être alloué. L'autre partie a répliqué que la vraie question n'était pas sur l'existence de la rente. La question décidée par la Cour du Banc de la Reine n'était pas l'existence absolue de cette rente foncière, mais la priorité de la créance hypothécaire de Mills *et al.* qui leur était refusée par le jugement, à cause d'une irrégularité fatale dans l'inscription hypothécaire. Cette créance hypothécaire de Mills *et al.* n'est que d'environ $500 bien au dessous du montant de $2,000 requis en ce cas pour donner le droit d'appel. D'accord avec le précédent de *Bourget & Blanchard* rapporté au vol. 9 p. 262 des rapports judiciaires de Québec et par analogie de principes, appel à la Cour Suprême est refusée dans la présente instance. In chambers. Tessier, J. January, 1886.

SURETIES.—*Their liability.—Brunet & Les Syndics de la Paroisse de la Pointe-Claire.* M. Judgment confirming, September, 1875.

Where sureties pay the debt of the party for which they have become security, they are subrogated in the creditor's rights.

And where, by a deed made subsequently to the payments, the securities admit having received the money to make such payment, and subrogate the lender in their rights, the subrogation will be valid, unless there be fraud. *Renny et al. & Moat.* Judgment confirming, 22 March, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J., dis. Rep. 2 Leg. News 97.

An action against a surety need not necessarily be preceded by an action to account against the principal. If the amount due by the principal be in question he may be called in as he was in this case. *La Compagnie d'Assurance des Cultivateurs, &c. & Barthe et al.* M. Judgment reversing, 16 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice and Tessier J., dis.

The surety-bond given under cap. 92, (C. S. L. C.) may validly bind the bonds-

man, although it be not made in duplicate, and be not recorded by the Prothonotary, and that no copy remained in the Prothonotary's office and none was deposited in the office of the Minister of Finance, and that no notice was given to the Attorney or Solicitor-General that the bond was to be given. *Blais & Gleason.* Q. Judgment confirming, 6 September, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk, J. dissenting. Reported 6 Q. L. R. 202.

Appellant wrote to Respondents the following letter :

Montreal, April 15th, 1876.

" MESSRS L. BERNIER & Co.,
City.

DEAR SIRS,

" At the request of Mr. Hillman, I, " herewith agree to guarantee the pay- " ment of a note signed by him, and " discounted by you, to the amount of " one hundred and seventy-five dollars, " which I promise to pay should Mr. " Hillman fail to do so, you to place " the note in my hands.

I am, Dears Sirs,
Yours truly,
(Signed), M. LESSER."

The date of this letter was partly left in blank. Respondents filled it in so as to make it correspond with a promissory note which they obtained from Hillman. The note was dishonoured, and Respondents sued Hillman and the Appellant. No service seems to have been effected against Hillman who was out of the country. Appellant filed a number of exceptions which were not proved, and specially that the note did not correspond with the letter of guarantee. The court was of opinion that the presumption arising from the fact of leaving part of the date of the letter in blank was to leave it to the parties to fill in a date to correspond with the note when made. *Lesser & Bernier et al.* M. Judgment confirming, 16 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A surety given by an agent for the collection of money cannot be sued until the principal has been called to account. *La Compagnie d'Assurance des Cultivateurs, &c. & Barthe et al.* M. Judgment confirming, 16 December, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

A surety who signs a letter of warranty promissing to pay a certain promissory note to be signed by another cannot complain that he is sued on the note and letter of warranty before the promiser is sued. The delay of the creditor to sue for more than a year after the note fell due is not negligence on the part of the creditor, and the surety is not relieved thereby. *Lesser & Bernier.* M. Judgment confirming, 16 December, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

SURETY OF OFFICIAL ASSIGNEE.—Where an official assignee has taken possession of an insolvent estate in that capacity, and subsequently the creditors have appointed him assignee to the estate, and while acting as assignee of the creditors he makes default to account for moneys of the estate, the creditors have recourse against the surety who guaranteed the due performance of his duties as official assignee. *The Canada Guarantee Company & McNicholls.* M. Judgment confirming, 24 Sep.. 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice and Ramsay, J. dis. Rep. 6 Leg. News 323.

SURETYSHIP.—The contract of suretyship is interpreted strictly, and the consent of a party, A, that the debt of another, B, shall take precedence of his is not an undertaking by A to see that B shall be paid. If B does not claim the privilege accorded to him, he cannot recover back from him, A, who has been paid. *Carignan et al. & Gagnon et al.* Q. Judgment confirming, 4 September, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Discussion.—A party who becomes security for another, under the condition that he will not be responsible either for capital or interest, or for any

costs whatever till after the discussion of certain advantages, cannot be called on to furnish the costs of such discussion beforehand. *Richard & Martel.* Q. Judgment reversing, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A note payable on demand, given to a bank to secure an overdrawn account of the maker, as well as to secure the forbearance of the bank for other advances, must be considered in the light of a continuing guarantee, and that the endorsers of such a note are not relieved from their liability by the fact that the bank did not make a demand of payment till after the insolvency of the maker, about twenty-seven months after the date of the note. *The Merchants' Bank & Whitfield.* M. Judgment reversing, 23 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 2 Dec. d'A. 157.

A guarantee given to a Bank, which afterwards was amalgamated with another Bank, did not bind the guarantors towards the consolidated Bank. *The Consolidated Bank & The Merchants' Bank.* M. Judgment confirming, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J. dissenting. Rep. 6 Leg. News 284.

An undertaking to give a party an introduction to a firm of responsibility and standing is to be understood a firm having that standing at the time of the introduction, and it is not a guarantee of continued solvency. *Bowen & Gordon et al.* M. Judgment confirming, 19 Jan., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 300.

Continuing, v. McGreevy & Mayrand. Judgment confirming, 7 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

V. Foley et al. & Cross et al. M. Judgment, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

SURVEY.—A survey of crown timber limits made without the presence of or notification to, one of the parties, has no authority to destroy the government survey duly filed in the Crown Lands Department and not in any way called in question. *Atkinson & Baptist et al.* Q. Judgment confirming, 8 February, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

TACITE RECONDUCTION.—(Overruling *Laflamme vs. Fennell*, 11 L. C. Jur., p. 288,) where a lease has been continued by tacit reconduction, a notice of three months is necessary to terminate such lease. *Webster & Lamontagne.* M. Judgment reversing, 21 September, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 19 J. 106.

TAXATION.—*Article* 712 *Municipal Code.—Exemption from Taxation.—Religious and Educational Institutions.—Property not possessed solely to derive a revenue therefrom.*

Les Dames Intimées, corporation religieuse, dont le but est surtout l'instruction des jeunes filles, ayant été taxées pour une propriété leur appartenant, située dans les limites de la municipalité Appelante, ont refusé de se rendre à cette demande et ont été poursuivies par l'Appelante pour le recouvrement de taxes municipales et scolaires.

Jugé:—Qu'en vertu de l'article 712 du Code Municipal et de la section 13 de l'Acte d'Education de 1869, les corporations pour les fins de l'éducation sont exemptes de toutes taxes municipales ou scolaires, pour les propriétés par elles occupées pour les fins pour lesquelles elles ont été établies et qu'elles ne possèdent pas uniquement pour en tirer un revenu.

2o. Que l'immeuble dont il s'agit en cette cause est occupé par les Intimées, pour les fins pour lesquelles leur corporation a été établie, et non pas pour en tirer un revenu.

Par Dorion, Juge en Chef, et Cross, J. *Jugé:* Que les Intimées, qui n'ont aucune école ou maison d'éducation dans les limites de la municipalité Appelante, et qui cultivent par elles-mêmes l'immeuble dont il est question, et dont les produits servent au soutient de leurs établissements en dehors de la municipalité, possèdent cet immeuble uniquement pour en retirer un revenu, et non pour les fins de l'éducation, et qu'elles en doivent les taxes municiales et scolaires. *The corporation of the village of Verdun & Les Sœurs de la Corporation de Notre-Dame de Montréal.* M. Judgment confirming, Jan. 27, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Sir A. A. Dorion, C. J., and Cross, J. dis. Rep. 4 Leg. News 115. 1 Dec. d'A. 163.

Property held by an educational establishment for the purposes of the institution and not directly for the purposes of revenue is not liable to taxation either under the M. C. art. 712 or under section 13 of the education act of 1869. *Corporation of the village of Verdun & The Sisters of the Congregation of Notre-Dame.* M. Judgment confirming, 25 January, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. The Chief Justice and Cross, J. dissenting. Rep. 4 Leg. News 115. 1 Dec. d'A. 163.

By the act 45 Vict. (Q.) ch. 22, "to provide for the exigencies of the "public service" of the Province of Quebec, a tax was imposed on every bank, insurance company, and other commercial corporation doing business in the Province. The tax was imposed in proportion to the paid up capital of the banks, together with a tax on each office, etc. Some of the corporations interested in the cases here determined have their principal offices out of the Province, and some were incorporated in England or in the United States. In some cases, the stock is held chiefly by persons not resident in the Province of Quebec.

The taxes imposed on corporations by the act in question are personal and

direct taxes within the Province, and such as are authorized by sect. 92, sub-sect. 2 of the B. N. A. Act, 1867. A corporation doing business in the Province is subject to taxation under sect. 92, sub-sect. 2, though all the shareholders are domiciled out of the Province.

Even assuming that the taxes in question should be considered as not falling within the denomination of direct taxes, the local legislature had power to impose the same, inasmuch as they were matters of a merely local or private nature in the Province, within the meaning of the B. N. A. Act, sect. 92, sub-sect. 16. (1) *The North British and Mercantile Fire and Life Insurance Co. & Lambe.* M. Judgment confirming, 23 January, 1885. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Sir A. A. Dorion, C. J., Cross, J. dis., were of opinion that the taxes in question are indirect taxes and are not authorized by sub-sect. 16 of sect. 92 of the B. N. A. Act, 1867. Rep. M. L. R. 1 Q. B. 122. 1 Dec. d'A. 112.

The formalities prescribed by the Municipal Code with reference to a collection roll must be strictly followed as in the case of an *acte de répartition* annexed to a *procès verbal*, and where such formalities have not been observed the taxes thereby imposed are not exigible and a sale of land for arrears of such pretended taxes will be annulled.

Where the taxes are illegal in consequence of there being no valid collection roll in existence, acquiescence will not give valididity to such assessment. *La Corporation du village du Bassin de Chambly & Scheffer.* M. Judgment confirming, 24 November, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. M. L. R. I. Q. B. 42. 7 Leg News 390.

Par acte du 4 Novembre, 1873, C. obtint du gouvernement fédéral une

(1) Confirmed in Privy Council. *See* APPENDIX.

promesse de vente d'immeuble situé dans la cité de Montréal, dont la possession devait lui être donnée que sous certaines conditions mentionnées à l'acte. Le 25 Octobre, 1875, C. vendit et transporta à l'Appelant tous ses droits résultant de la dite promesse de vente. Les conditions stipulées ne furent remplies et la possession de l'immeuble ne fut donnée à l'Appelant que le 1er Novembre, 1876, et il n'obtint son titre que le 4 Novembre. Le rôle annuel de cotisation pour l'année civique commençant le 1er Mai, 1876, fut parachevé et déposé au bureau du trésorier de la cité, le 28 Septembre, 1876, et sur ce rôle l'Appelant était montionné comme contribuable pour l'immeuble en question.

Jugé: 1o. Que les taxes municipales dans la cité de Montréal ne sont pas payables jour par jour, mais sont indivisibles, et sont dues par le propriétaire et possesseur de l'immeuble sujet à cotisation au temps de l'imposition de ces taxes.

2o. Que l'Appelant n'est devenu propriétaire de l'immeuble en question que le 4 Novembre 1876, et que le gouvernement fédéral en a été le propriétaire jusqu'à cette date.

3o. Que par conséquent les propriétés du gouvernement n'étant pas sujettes aux taxes municipales, l'immeuble en question n'était pas susceptible d'être taxé le 28 Septembre 1876, date de la mise en vigueur du rôle de cotisation pour l'année civique commençant le 1er Mai 1876, et l'acquisition subséquente de l'immeuble par l'Appelant ne l'a pas rendu contribuable pour aucune partie des cotisations pour cette année.

4o. Que le fait que l'Appelant avait été cotisé et taxé sur le rôle de cette année, et qu'il ne s'en était pas plaint de la manière réglée par la charte de la cité, ne pouvait pas le rendre contribuable pour ces taxes. *Hogan et la Cité de Montréal.* M. Judgment reversing, 19 November, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier,

Cross, JJ. Rep. M. L. R. I. Q. B. 60. 7 Leg. News, 378.

Where an action had been brought by one of several persons assessed for the cost of a special improvement, to set aside the assessment roll, that any other person assessed for the cost of the same improvement had an interest which entitled him to intervene if the original plaintiff abandoned the case.

Where an action was instituted before the expiration of the delay fixed by a statute for contesting assessment rolls, the right of an intervenant taking the same conclusions as those of the original action was not barred, though the delay had expired before the intervention was filed.

Under the Statute 31 Vict. (Q), ch. 37, it was necessary that the Commissioners appointed to carry out an expropriation, and to determine who are the parties interested therein and to be assessed for the purpose of the proposed improvement, should give public notice of their proceedings in the manner therein provided, and in the absence of such notice the assessment roll made by the Commissioners was null and void; nor could the subsequent homologation of the report of Commissioners by the Superior Court give validity to such proceedings. *Hubert & The City of Montreal.* M. Judgment reversing, 24 November, 1884. Ramsay, Tessier, Baby, JJ., and Doherty and Caron, JJ. *ad hoc.* Rep. M. L. R. 1. Q. B. 337.

Après le démembrement d'une municipalité et sa division en deux municipalités distinctes, tout le territoire formant ci-devant partie de l'ancienne municipalité, demeure affecté au paiement des anciennes dettes, et que le conseil de l'ancienne municipalité et ses officiers peuvent percevoir sur tout le territoire, des taxes imposées pour cet objet, et y imposer pour le même objet de nouvelles taxes basées sur la valeur des biens imposables d'après le rôle d'évaluation en force, dans la municipalité originaire, lors du changement de limites, comme si ce changement n'avait pas eu lieu.

La Corporation de l'ancienne municipalité a un droit d'action pour recouvrer ces taxes contre les propriétaires de ces biens imposables, mais que la Corporation de la municipalité nouvelle ne peut être directement tenue au paiement de ces taxes, que dans le cas d'un acte d'accord entre les deux corporations, conformément à l'article 84 (1) du Code Municipal. *La Corporation de Notre-Dame du Sacré-Cœur & La Corporation de St. Germain de Rimouski.* Q. Judgment reversing, 6 December 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 10 Q. R. R. 316, 7 Leg. News 407, 8 Leg. News 61.

Les corporations religieuses établies pour les fins de l'éducation, sont exemptes de toutes taxes municipales et scolaires, pour les propriétés par elles occupées pour les fins pour lesquelles elles ont été établies et qu'elles ne possèdent pas uniquement pour en tirer un revenu. *Les Commissaires d'Ecoles de St. Roch Nord & Le Séminaire de Québec.* Q. Judgment confirming, 4 October, 1884. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ. Rep. 10 Q. L. R. 335, 8 Leg. News 83.

A person who claims a total exemption for taxes, and is proceeded against as a rate-payer, may make opposition under article 970 (2) of the Municipal

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(1) The Council bound to settle the joint debts and obligations may, by mutual agreement with the Council entrusted with the municipal administration of any other part of the territory liable for the payment of such debts and obligations, determine the total amount jointly due by all the owners or occupants of the taxable property comprised within such part of the territory.

(2) Every rate-payer who is required to pay either as municipal or school taxes an amount greater than that which he owes may plead such fact by exception to any action or claim, or by opposition to any seizure of his moveable property and effects made under art. 962. Such opposition must be accompained by an affidavit attesting the truth of the allegations it contains, be served on the

Code. *The Montreal Cotton Co. & The Corporation of the Town of Valleyfield.* M. Judgment reversing, 17 September, 1880. Sir A. Dorion, C. J., Monk, Ramsay, Chagnon, JJ. Rep. 3 Leg. News 317, 9 Rev. Leg. 551.

TELEGRAPH COMPANY.—A lease by a Telegraph Company of all its lines for ninety-seven years, at a fixed annual rent, the lessees to have control of the rates for transmission of messages, etc., was held to be legal, their being a clause in the charter giving the company power to let, convey or otherwise part with their estate, real, personal or mixed. *The Montreal Telegraph Company & Low.* M. Judgment reversing, 19 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. The Chief Justice and Ramsay, J. dis. Rep. 6 Leg. News 327.

TENDER.—Where a salary is payable in bonds to be taken at 50 per cent. of their nominal value, a tender of three bonds, equal to $1,500 par value, is not a legal tender of the sum of $619.50 or $1.239 in debentures, if the party tendering attaches the condition that the difference of $261 shall be returned to him in money. *Legge & The Laurentian Railway Co.* M. Judgment reversing, 17 Dec., 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 98, 3 Leg. News 23.

A party cannot exercise a *faculté de réméré* without making tender of the price and costs. *Walker & Sheppard.* M. Judgment confirming, September, 1876. Sir A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

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officer entrusted with the execution of the warrant of seizure and be returned within the eight days next following before the Circuit Court for the county or district or before the Magistrates Court at its next session. It is subsequently heard and decided according to the ordinary rules of procedure of this court. The opposition delays the sale, provided it is accompanied by an order for that purpose signed by the judge or by the district magistrate, or by the clerk of the court before which it is returnable.

TENDER OF COMPROMISE.—Offer of creditor to accept amount previously tendered by debtor, if not promptly acted upon by debtor, may be revoked. *Snowdon & Nelson.* M. Judgment confirming, 15 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Reported 3 Leg. News 210.

Tenders for the execution of contemplated public works. A case of no legal interest. *Kane & Wright et al.* M. 21 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Leg. News 15, 1 Dec. d'A. 297.

THEFT.—When an agent is intrusted with money to expend, and he accounts for it by saying it was stolen from him, he must prove that it was, or he will be condemned to re-pay it. *Gravel & Martin et al.* M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J. dissenting.

THOROUGHFARE. — *Prescription of ten years.*—Where land was given to the City of Montreal to be used as a public market, and the City, long after, converted it into a public thoroughfare, and registered the same in the register of public streets and squares; *held*, that the donors were not entitled after the lapse of ten years, to claim the rescission of the donation on the ground of such conversion. *Chevigny de la Chevrotière & The City of Montreal.* M. Judgment confirming, 19 Sep., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 6 Leg. News 348.

TIERS DETENTEURS. — *Improvements.*—Le tiers détenteur, qui a fait des améliorations sur l'immeuble hypothéqué, ne peut les enlever après le jugement en déclaration d'hypothèque, si, par son titre d'acquisition, il s'est chargé de l'hypothèque et s'est obligé de payer la dette hypothécaire (art. 2065 and 2072, C. C.) *La Société Canadienne de Construction de Montréal & Lapointe.* M. Judgment reversed, 26 Jan., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 1 Dec. d'A. 183.

TIERS-SAISI. — When a *tiers-saisi*, whose declaration is contested, fails to answer the contestation, the allegations of such contestation are not held to be admitted, but proof must be adduced in support of such contestation. *Mattinson & Cadieux.* M. Judgment reversing, 22 March, 1880. Rep. 25 Jurist 255. 3 Leg. News 110.

Un tiers-saisi appelé à déclarer ce qu'il doit à une partie ainsi désignée dans le bref, est tenu de déclarer ce qu'il lui doit tant personnellement qu'en sa qualité de légataire ou usufruitière universelle.

Le juge, lors de l'audition finale, est tenu de réviser une décision maintenant une objection faite par un tiers-saisi de déclarer ce qu'il doit personnellement à un légataire universel ou à un usufruitier universel, ce n'est pas chose jugée. *Hudon & Rivard.* M. Judgment, 22 December, 1879. Monk, Ramsay, Tessier, Cross, JJ. Rep. 24 J. 268. 3 Leg. News 414.

Contrainte par corps.—La contrainte par corps n'a pas lieu contre un tiers-saisi qui, ayant déclaré ne rien devoir au Défendeur, a été condamné, sur contestation de sa déclaration, à rapporter un piano qu'il avait acheté du Défendeur en fraude des droits des créanciers ou à payer au Demandeur le montant de sa créance. *Racine & Kane.* M. Judgment reversing, 19 January, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 346.

The attachment in the hands of a garnishee of a debt afterwards due to the Defendant by the garnishee, is valid, if such debt becomes due before the garnishee makes his declaration. *The Molson's Bank & Lionais.* M. Judgment reversing, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 252. 2 Dec. d'A. 176.

TIMBER.—A bank lent on a cove receipt covering a quantity of timber. Respondent took over the security and paid off the bank, agreeing to pay any balance that might be over in a certain way. The owner of the timber was in difficulties and became insolvent. The timber was seized by the Appellant, the cove-keepers in whose cove the timber lay, under a judgment obtained by them against the owner of the timber. *Held*, that the Respondent had a right to disinterest the bank and in good faith, and not knowing the insolvency of the owners, to undertake to dispose of the balance without fraud. And it did not signify whether the money by which the bank was disinterested passed through the hands of the owners or not. *Cook et al. & Fraser.* Q. Judgment confirming, 7 December, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Monk, Baby, JJ. dis.

The purchaser of stolen timber who has participated in the theft, either before or after the committing of the offence, is liable in damages to the proprietor, although he may have paid for the wood he received. *DeBeaujeu & Perry.* M. Judgment reversing (as to the evidence only, for in the Court below the principle does not appear to be ignored), September, 1875. Dorion, C. J., Taschereau, Ramsay, Sanborn, JJ. Sanborn, J. dis.

TIMBER LIMITS. — *Warranty.*—The sale of timber limits carries with it no warranty of title *de droit.*

A warranty in a deed in the nature of a *titre nouvel*, or substituted title, which was not in the original title, and for which no new consideration was given will be considered as *style de notaire* and inoperative to create a special warranty. *Cushing & Ducondu.* Judgment confirming, 17 Sep., 1881. Dorion, C. J., Monk, Ramsay, Cross, JJ. 3 Leg. News 350. But in the Supreme Court it was held (Henry and Gwynne, JJ., dis.), reversing the judgment of the Court of Queen's Bench in Appeal, at Montreal (see 3 Legal News, 350), that the Respondents having guaranted the Appellants against all trouble whatsoever, the latter were entitled, pursuant to art. 1518 C. C., to recover the value of the limits from which they had

been evicted, proportionally upon the whole price, and damages to be estimated according to the increased value of said limits at the time of eviction, and also to recover, pursuant to art. 1515 C. C., for all improvements; but as the evidence as to proportionate value and damages was not satisfactory, it was ordered that the record should be sent back to the Court of first instance, and that upon a report to be made by experts to that Court on the value of the said limits proportionally upon the whole price, and on the increased value of the same at the time of eviction, the case be proceeded with as to law and justice might appertain. 5 Leg. News 72. Appeal having been allowed to the Privy Council the judgment was reversed there. (1)

Settlers rights. — Appellants were settled on several lots of Government land. They had paid the price, $653.10, and were only to pay a sum, not then determined, for occupation. No patent or location ticket issued. This was in July, 1879. In December, 1885, Respondent obtained a license to cut timber covering these lots. Appellants cut a quantity of timber manufactured into logs, and drew it to the *jetée* where it was seized by Respondent. The court below held the seizure good and condemned the Appellants to deliver up the wood or to pay Respondent the value of the logs, $1,249.45.

The Court of Appeal maintained the seizure and condemned Appellants to surrender the logs or to pay the value of the timber, not of the logs, namely, $310. *Reynor & Thompson et al.* Q. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. 5 Leg. News 421. 3 Dec. d'A. 75. 12 Rev. Leg. 150.

Immoveable.—*v.* REVOCATORY ACTION.

TIME.—M., against whom a *capias* had issued, deposited a cheque in the hands of Appellants, the agreement being that if he appeared with his bail at their office by eleven o'clock on the following morning the cheque was to be returned; if he did not appear, the cheque was to be applied to the payment of debt and costs. There was a conflict of evidence as to whether M. appeared at eleven or a few minutes after, and as the majority of the Court viewed the evidence one of the bondsmen agreed upon was not present.

Held: (by the whole Court)—That a difference of a few minutes in a contract of this nature was too slight to be material, and would not have justified the application of the cheque to the payment of the debt and costs, if M. had appeared with his bail as agreed; but *held* by the majority of the Court, that the absence of one of the bondsmen was a non-compliance with the agreement, which justified the application of the cheque to the payment of the debt and costs. *MacMaster & Moffat.* M. Judgment reversing, 26 May, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Sir A. A. Dorion, C. J., Cross, J. dissenting. Rep. M. L. R. I. Q. B. 387, 4 Dec. d'A. 238.

Neither the day of service nor the terminal day is counted in the delays fixed for summoning. Delays continue to run upon Sundays and holidays; but if a delay expires on a holiday, it is of right extended to the next following day. The same rule applies to all other delays in procedure. Art. 24 C. C. P.

That in computation of time no fractions of a day be allowed nor shall any Sunday or binding holiday (*fête d'obligation*) be reckoned, unless otherwise provided for by law. Rules of Practice, S. C. 17 Dec., 1850. Art. XI.

TITHES.—When a portion of a canonical parish, civilly constituted, is detached by decree of the bishop, and annexed to a canonical parish not civilly constituted, the tithe is due by an inhabitant of the dismembered parish to the new *curé*.

Under the old law of France prior to the cession, the bishop had the right to create, unite or divide, parishes in the interest of the church, having due regard to vested rights; and this condition of things has not been affected

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by the laws enacted for the province of Quebec, since the cession of Canada. *Cadot & Ouimet.* M. Judgment confirming, 21 May, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. M. L. R. 2 Q. B. p. 211.

TITLE. — A memorandum between neighbours agreeing to the placing of a fence to avoid the inconvenience arising from a river, is a title to the lands affected. *Libby & Weyman.* M. Judgment March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Bélanger, JJ. Taschereau, Ramsay, dissenting.

A title bad in itself may be relatively good. *Bignell & King.* Q. Judgment confirming, 5 September, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

Although art. 2098 of the C. C. obliges the heirs to register their title, the only penalty attached to their failure to do so is, that all conveyances, transfers or real rights granted by them are without effect. *Dallaire & Gravel.* M. Judgment reversing, 21 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 22 J. 286. 2 Leg. News 15.

TITLE AND GOOD FAITH. — The knowledge by a purchaser of the existence of a hypothec in the nature of a constituted rent on the property acquired, such hypothec being formally set forth in the deed of acquisition, constitutes him in bad faith, and he cannot invoke the prescription of ten years; and the possession of his widow after his death, (the immoveable having been acquired during the marriage with community), and of his son, under a deed of donation from the widow, are subject to the same defect *Blain & Vaultrin.* M. Judgment confirming, 22 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 81. 9 Rev. Leg. 634.

Title recognitive of a prior agreement, which contains a warranty not in the prior deed, and for which warranty there is no new consideration, will be deemed to be given by error and not be binding. The sale of Crown timber limits implies no warranty that the limits were not already granted. *Cushing & Ducondu.* M. Judgment confirming, 17 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Rep. 3 Leg. News 350.

NOTE.—This case went to the Supreme Court and was there reversed.

But leave to appeal being granted to the Privy Council, the decision of the Supreme Court was reversed.

TITLE TO SERVITUDE.—*v.* SERVITUDE.

TOLL BRIDGES.—The Act of the Legislature of Quebec, 32 Vict., cap. 15, sect. 190, authorizing the Lieutenant Governor in Council to declare forfeit (for default to make repairs) the right of collecting tolls on any toll bridge, and to transfer the property therein, was within the powers of the local legislature, and that the Orders in Council mentioned in this case, forfeiting the right of exacting tolls for passing on a toll bridge which had been placed under the management of the Municipal Council of Cleveland and Melbourne (Appellants) by order of the Executive Council of the former Province of Canada, and transferring the control of the property to the Appellants, were not *ultra vires. Municipality of Township of Cleveland & Municipality of Township of Melbourne & Brompton Gore.* M. Judgment reversing, 26 February, 1881. Sir A. A. Dorion, Monk, Ramsay, Cross, Baby, JJ. Rep. 26 J. 1. 4 Leg. News 277. 1 Dec. d'A. 353.

TOWING OUT.—In an action on a marine policy in which the parties agreed the ship should "go out in tow" tried before a jury, the verdict was for the Plaintiff, the jury finding in fact that the ship did "go out in tow." The Court of Review held that the ship did not go out in tow, as in the port of Quebec going out in tow meant going to the "Traverse" at least, but the verdict was entered for Plaintiff the Court considering that this was not a warranty. *Held* in the Q. B. that the

jury had found as a fact that the vessel had complied with the warranty sufficiently to allow the jury to find the fact proved, and that there was no evidence to establish that by the usage at Quebec going out in tow had any particular meaning. *The British America Insurance Co. & Connolly.* Q. Judgment confirming, 5 June, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, J. dissenting.

TOWAGE. — A steamship carrying passengers and a valuable cargo, from Liverpool to Montreal, having lost her screw, and having been six days under sail, was in the Gulf of St. Lawrence near a dangerous coast, and exposed to peril.

Held:—That an agreement made by the captain to pay £800 sterling for towage into Gaspé Harbor (a distance of about 50 miles) should be enforced, seeing that the service might properly be treated as salvage, and as such was worth at least the sum fixed by the agreement. *Stewart & Brewis.* M. Judgment confirming, 20 June, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Ramsay, J. *dub.* Rep. 26 J. 14, 4 Leg. News 203. Dec. d'A. 319.

TOWNSHIP LANDS. — A statutory mode of quieting and ascertaining titles: *Green & Stanbridge.* M. Judgment confirming, January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

TRADE MARK.—*Action for copying a trade mark.*—A trade mark consisting of a label with the seal of the corporation defendant, composed of a virgin sitting on a throne, etc., with the words "Compound Syrup of Spruce Gum," and that the appearance of the preparation sold under the mark first mentioned was essentially different, and not calculated to deceive.

The Defendants, being a corporation without right to trade, could not maintain an action for damages to their trade as vendors of a syrup of spruce gum.

No special damages were proved by plaintiffs, and that not having shown license possessed by themselves to trade, they had not established any right of action.

Even if plaintiffs had proved their license, an action would not lie by them in their own name against unlicensed vendors. *Kerry et al. & Les Sœurs de la Providence.* M. Judgment confirming, 18 September, 1878. Monk, Ramsay, Tessier, Cross, JJ. Rep. 26 J. 51. 1 Leg. News 472.

Damages for infringement of. *Labatt & Trester.* M. Judgment confirming, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

A sale by appellant, a biscuit manufacturer, of his stock in trade, with the good-will and all advantages pertaining to the name and business of the vendor, conveyed the exclusive right to use the name "Mackinnon's" as well as the device of a boar's head grasping in its paws a bone (which had been in use by Appellant prior to and at the time of the sale), on labels used, and generally in all matters connected with said business, and, consequently, that Appellant had no right after such sale to use said name and device in the manufacture and sale of biscuits. *Mackinnon & Thompson.* M. Judgment confirming, 20 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 26 J. 321. 5 Leg. News 396. 3 Dec. d'A. 12.

TRADITION.—It is not sufficient tradition of bricks purporting to be sold to a party, but really pledged to him, to declare in the deed that the bricks "transportées ci-dessus" were "actuellement placées dans une bâtisse or shed" indicated. And the tradition after insolvency is null. *Parent & Falardeau.* Q. Judgment confirming, 5 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

TRANSACTION.—A corporation may validly make a transaction, and a transaction entered into by the governing body as to a matter within its admi-

nistrative faculties will bind the corporation. *Bachand & The Corporation of the Parish of St. Théodore d'Acton.* M. Judgment reversing, September, 1874. Monk, Taschereau, Ramsay, Loranger, Beaudry, JJ. Monk and Beaudry, JJ. dissenting.

To be legally a transaction the deed should set up the fact on which the parties desire to transact. *Doutney & Richard et al.* M. Judgment confirming, March, 1879. Monk, Ramsay, Tessier, Cross, Routhier, JJ.

Annulling.—The plaintiff, in bringing an action to set aside a deed of *transaction* by which she desisted from a judgment annulling a *partage*, and ceded all her rights in the succession to the defendant, should have offered to restore the sum of money which she received as a consideration of said transfer. *Charlebois & Charlebois.* M. Judgment reversing, 28 Nov. 1882. Rep. 26 J. 376.

Transaction.—*v.* ERREUR DE DROIT.—Deed not countersigned.

TRANSFER.—Rights of *cessionnaire. Hogle et al. & Campbell.* M. Judgment reversing, 26 September, 1884. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Action by Appellant taking the quality of *cessionnaire* of one P. who obtained a sub-contract from Respondents to make certain fencing on the line of the North Shore Railroad. Among the pleas was one that Appellant was not the *cessionnaire.* The judgment in the court below dismissed the action, but in Appeal this judgment was reversed on the ground of proof of the work done. *Dorion & Dufresne.* M. Judgment reversing, Quebec December, 1882. Rep. 5 Leg. News 418. Ramsay, J. dis., said Appellant's title was based on the transfer of the assignee to him of the whole estate, save one item, dated the 29th May, 1879. This deed was not signified to the Respondents. Were they obliged to take notice of it? If so, the Appellant's letters to them affect the question, and were they entitled to make the declaration on the *saisie arrêt.* I think by the assignee's title, Dorion was seized of the estate of the Insolvent and Defendants were held to know it. If, however, the Defendants had been misled by Plaintiffs letters of January, 1878, it might have justified them in dealing with P. as though he were still owner of the estate—that is to say Appellant would be estopped from claiming on the deed of transfer by the assignee. But I do not think that the letters were of a nature to misled, or that they did misled Respondents, and this for two reasons. First, they were written in January, 1878, and the title from the assignee transferring the estate to D. was not passed until May, after the judgment of the Court confirming the discharge of the Insolvent. Besides in the former of these letters. Dorion told Gérin he was the *cessionnaire* of P. He did not then deceive him on that all important point. Second, in January, 1879, a correspondence between the agent of Respondents and Mr. Dorion took place, in which Mr. Gérin, the agent, wrote to Appellant offering him a note for $1,000 to be accounted for when the first contractor should give them an *état définitif.* It will be observed that this letter was written in answer to a demand for *un règlement immédiat de l'affaire Payen.* It was after this that the Respondents acknowledged, as *tiers saisie,* to be indebted to P. without giving any notice to Dorion. They alleged he knew of the *saisie arrêt.* This is not very probable and it is not proved. I would therefore reverse the judgment and award Appellant the full balance due on the cost of the 608 arpents of fence.

Le cessionnaire, qui s'oblige de payer toutes les dettes de son cédant, est tenu de celles qui, quoiqu'indéterminées, ont une cause; et spécialement, que des services rendus au cédant, et des argents dépensés pour lui, constituent une créance qui donnent le droit d'en poursuivre le recouvrement contre le cessionnaire.

Tel cessionnaire n'est plus fondé à invoquer le défaut de considération s'il a reconnu devoir et promis payer telle

créance, et s'il en a déjà acquitté une partie. *McGreevey & Russell.* Q. Judgment confirming. 5 October, 1885. Monk, Ramsay, Tessier, Cross, Baby, JJ. Rep. 14 Rev. Leg. 348.

To effect a composition with his creditors, James Baylis gave his notes endorsed by McKeand, who as security took an assigment of the estate, including a property in the City of Montreal. McKeand leased this property to the Appellants, James Baylis & Son, and subsequently reconveyed the property to James Baylis, with right to recover the rents accrued or to accrue. Subsequently the Respondent was appointed sequestrator to the property in a hypothecary action by Crossley & Sons against McKeand, and sued Appellant, to recover the rent from date of lease by McKeand to the date of his appointment.

The transfer of rent by McKeand to Baylis did not require to be registered to enable Baylis to receive the rents.

The receipts *sous seing privé* given by Baylis to the Appellant, were *primâ facie* evidence that the rent had been paid at the date of the receipt and that it was for the Respondent to establish the contrary. *Baylis & Stanton.* M. Judgment reversing, 24 March, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 2 Dec. d'A. 350.

Transfer of Bank shares by a father in trust to himself for the benefit of his minor child without value, and accepted by the father although recognized by the bank by entering them as thus held, does not debar the bank from refusing to pay to the father the dividends accruing on such shares, he having become insolvent and largely indebted to the bank, the acceptance by the father being inoperative to vest the title in the minor. *Walsh & The Union Bank.* Q. Judgment confirming, 4 June, 1880. Sir A. A Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

TRESPASS.—An action of damages for trespass will lie against any one acting under the orders of a municipal

council, proceeding to open a road on another's land before the preliminaries required by the municipal code to enable the municipality to enter into possession have been adopted. *Holton & Callaghan.* Q. Judgment reversing, 2 December, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 9 Rev. Leg. 665.

An action of damages, complaining that the Respondent unlawfully tore down his fences in constructing a road, which was to be a front road, of certain lots of land described in the declaration (such description not including the appellant's lot), is not demurrable. *Whitman & The Corporation of Stanbridge.* M. Judgment reversing, 18 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J. dissenting. Reported 23 J. 176. 1 Leg. News 474. 9 Rev. Leg. 652.

Held, confirming the judgment of the Superior Court that a tidal river which is difficult of navigation, but in which barges have been occasionally and can be used, is not navigable, and therefore subject to the authority of the Provincial legislature. *Bell & The Corporation of the City of Quebec.* Q. Judgment confirming, 8 September, 1877. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Ramsay, J. dissenting.

NOTE.—This case was confirming in the Privy Council. (1)

In a second action of damages for trespass, the plaintiff must establish some new act of trespass, and if there be no such act alleged or proved, and there be no conclusions except for damages, the action will be set aside. *Hall & The Corporation of Levis.* Q. Judgment confirming, 4 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

In estimating the amount of damages to be awarded to the Plaintiff, the Court is justified in taking into consideration the slightness of the fault

(1) *See* APPENDIX.

and whether the defendant was acting maliciously; and a judgment of the Court of Review reducing the damages awarded by the first judgment to a fourth will be maintained. *Mann & Macdonald.* M. Judgment confirming, 15 May, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A trespass will not justify an assault of an aggravated character. So where two people pretend to be legally entitled to a wharf, and one puts wood upon it, which the other proceeds to remove with a great force of men, and a scuffle ensues, and the owner of the wood is seized and severely beaten, he will be entitled to recover damages from his assaillant. *Méthot & Burke.* Q. Judgment confirming, 4 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The Respondents had destroyed a bridge leading to a wharf erected by the Appellants or their auteurs, built in the navigable waters of the St. Lawrence and which bridge was a nuisance to the navigation. *Held* by the Queen's Bench, confirming the judgment of the Superior Court, that no damages were due to Appellants. *Caverhill & Robillard.* M. Judgment confirming, 27 January, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Dorion, C. J. dissenting.

NOTE.—In the Supreme Court this judgment was reversed. 2 S. C. R. 575.

An action for damages for a trespass on lands of Plaintiff against one of the trespassers for his share of the damage, does not bar an action against a joint-trespasser, unless it be proved that Plaintiff has been fully indemnified. *Corporation of St. Gabriel West & Holton.* Q. Judgment confirming, 6 March, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, Sanborn, JJ. dis. Rep. 8 Rev. Leg. 293.

Where a person went without leave on the property of another, mere threats of using violence is not such a wrongdoing as will sustain an action of damages. *Cournoy & Laudon.* Q. Judgment confirming, 8 October, 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Baby, JJ.

If a neighbour builds on a wall which is not *mitoyen*, without taking the preliminary proceedings required by law, he will be guilty of trespass, and the Court will condemn him to damages for such trespass and to take down the building so erected.

But if by his plea the Defendant offers to pay for the use of the wall the Court will suspend its order to demolish the building, in order to give the Defendant time to take the proceedings by law required to authorize him to make the wall common. *Hart & Joyce.* M. Judgment reversing, 22 June, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 8 Rev. Leg. 209. Confirmed in Supreme Court, January, 1877. Richards, Q.C., Ritchie, Strong, Taschereau, Fournier, Henry, JJ. 1 S. C. R. 321.

TRIAL.—A question raised by motion in arrest of judgment is a question arising on the trial, and properly reserved. *The Queen v. Deery.* M. Judgment on reserved case 18 Dec., 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 26 J. 129.

"Trial," within the meaning of C. S. L. C., c. 77, s. 57, is not terminated until sentence is rendered, and a "question which has arisen on the trial" does not necessarily mean a question that was raised at the trial, but one that took its rise at the trial; and therefore a point not mentioned by the defence may be reserved by the Court. *Reg. v. Bain.* M. Judgment, 22 June, 1877. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 23 J. 327.

If the Plaintiff fails to appear when the cause is called for hearing he may be non-suited; but the non-suit may be set aside, and a *venire de novo* may be ordered, according to English practice, on payment of costs by Plaintiff. *Bain & White et al.* M. Judgment reversing 22 Nov., 1881. Sir A. A. Dorion, C. J.

TRIAL BY JURY.—A Plaintiff having a right to a trial by jury, who has not declared by his declaration that he choses his case to be tried by a jury, may make his option after plea filed, and before completing the issue, notwithstanding the 64th rule of Practice. *Mason & Gebhardt.* M. Judgment reversing, June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

An agreement to go into partnership with another to construct a railway is commercial, and consequently an action of damages for the breach of such contract may be tried by jury. *McLea & McDonald.* M. Judgment reversing, 3 Feb., 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

The service, within four days after issue joined on amended pleadings, of a notice of motion praying *acte* of the mover to have a trial by jury, and the making of such motion subsequently, are a sufficient compliance with the requirements of art. 350 of the Code of C. P. *Brown & The Imperial Fire Ins. Co.* M. Judgment reversing, Dec., 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 20 J. 179.

TROUBLE.—The *adjudicataire* of real estate sold by the sheriff is *troublé* in his possession by an intervention setting up that a creditor of the former owner of the property sold is not paid and that the money has not been paid into Court. *Dawson & Ogden.* Q. Judgment reversing, 8 March, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The production of a registrar's certificate, showing that mortgages are registered against the property purchased, which mortgages do not appear to have been discharged, is sufficient to support a plea of fear of *trouble*, under art. 1535 C. C.

In such case the balance of purchase money which the buyer has yet to pay on the property is the only amount for which he can claim security. *Parker & Pelton.* M. Judgment reversing, 18 September, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, JJ. Rep. 21 J. 253.

Danger of trouble. — *v.* SALE BY SHERIFF.

TROUBLE DE DROIT.—Where it was stipulated in a deed of sale that the purchasers should retain an amount to pay the Corporation of the City of Montreal a certain sum as a special assessment for an improvement, in case the proceedings in expropriation, then being contested were maintained, and the corporation abandoned said proceedings, the vendor may recover the sum so retained; and it is no answer in the mouth of the purchaser to say, that the corporation has obtained power to make a new assessment.

But the power to make a new assessment is a *trouble de droit* and gives the purchaser the right to demand security. *Chabot & La Banque Jacques-Cartier.* M. Judgment reversing, 20 Sep., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

TRUSTEES. — Where property was vested in four trustees, two of whom are dead, for the use of a presbyterian congregation in connection with the Church of Scotland, one of the surviving trustees cannot sue the other to give possession of the property, in order that he may dispose of it by handing it over to another religious body, constituted out of an amalgamation of different religious bodies calling itself "The Presbyterian Church in Canada." *Morrison & McCuaig.* M. 20 Jan., 1883. Sir A. A. Dorion, C. J., Ramsay, Cross, Baby, JJ.

Indictment under 32 and 33 Vict., ch. 21, section 78, which is as follows :

"Whatsoever, *being intrusted* either "solely or jointly with any other per- "son, with any *power of attorney for* "*the sale or transfer* of any *property*, "fraudulently sells or transfers, or "otherwise converts the same or any "part thereof to his own use or benefit, "or to the use or benefit of any person

" other than the person by whom he " was so intrusted, is guilty of a misde- " meanor, and shall be liable to any of " the punishments which the Court " may award as hereinbefore last men- " tioned."

Held :—That the Power of Attorney, mentioned in section 78, of 32 and 33 Vict., ch. 21, must be a *written Power of Attorney*, and oral testimony of a verbal power of Attorney will not bring the Defendant's act within the scope of that statute. *Regina & Chorimand.* Q. Reserved case, conviction quashed. 8 September, 1874.

Where a party gives a power authorizing another to make, and endorse promissory notes for all matters " arising out of transactions connected with the business of the constituent only " do not cast on a banker, receiving such notes in the ordinary course of business and in good faith, the obligation to enquire and know whether the agent had mis-used his trust and given the notes for other consideration. *The Molson's Bank & Bank of Commerce.* M. Judgment reversing, 21 Dec., 1878. Dorion, C. J., Monk, Ramsay, Cross, Routhier, JJ.

TUTELLE.—*Compte de.* — The omission by a tutor to enter in the inventory to the debit of the minor, a debt due to him, operates a forfeiture of the debt. *Prince & Gagnon.* Q. Judgment reforming, 8 Sep. 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

TUTOR. — A tutor appeared personally in a deed of sale and declared that he bought the immovable hypothecated in favour of Plaintiff, for himself, his heirs or assigns, and promised personally to pay the different creditors hypothecarily, and he added. " Le dit Gleason s'oblige personnellement à payer le montant susdit, mais il veut et entend que la propriété ainsi achetée appartienne à ses enfants mineurs auxquels il a été nommé tuteur en justice, pour leur tenir lieu de la part de communauté de sa défunte épouse." *Held*, that this was a title to the children, there being no renunciation, and that an action against Gleason *ès-qualité.* would lie for the amount of the hypothec. *Gleason ès-qualité & Hill.* Q. Judgment confirming, 3 Dec., 1881. Monk, Ramsay, Tessier, Cross, Baby, JJ.

A tutor has a right, when duly authorizeed, to take up the *instance* in and prosecute an action *en partage* already begun by the *auteurs* of the minor. *Cutting & Jordan.* M. Judgment confirming, 13 February, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Bélanger, JJ. Rep. 19 J. 139.

A tutor suing *ès qualité* may be a witness in the suit for his pupil. c. opinion of Casault, J. 7 Q. L. R. 59. The point was not decided necessarily in appeal, the proceeding by the tutor not being established, even with his evidence; but the Court did not question the ruling of the Superior Court on the point. *Pelletier & Thompson et al.* Q. Judgment confirming, 3 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Executors are only responsible for what they actually receive, and are not jointly and severally responsible for each other's administration.

Where a person, besides being executor, acts as if he were the tutor (though not really so) of a minor, to whom the estate he administers belongs, he cannot charge interest on monies expended by him in excess of its receipts.

An executor under the circumstances above mentioned has, however, a right to claim interest on all interest-bearing debts paid by him in the interest of the minor to prevent the sacrifice of her real estate.

On the contestation of the Appellant's account and its final adjustment by the Court, the female Respondent owes the Appellant the sum of $590.07. *Miller & Coleman.* M. Judgment reversing, 25 April, 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby

JJ. Rep. 25 J. 196. 4 Leg. News 268. 2 Dec. d'A. 33.

Taking the administration of a minor's estate and acting as a tutor, subjects the party so acting to account for his administration as a tutor. ***Miller & Coleman et al.*** Judgment confirming, June 1875. Dorion, Monk, Taschereau, Ramsay, Sanborn, JJ.

A tutor may be appointed in Canada to minors living in England who have property in Canada. ***Brooke et al. & Bloomfield, ès qual.*** M. Judgment confirming, 15 September, 1874. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Rep. 5 Rev. Leg. 533.

TUTORSHIP.—The non-registration of a tutorship must be pleaded to avail as a defence to an action by the tutor.

The Court of appeals will not disturb a judgmeut for aliments to a mother, tutrix of her minor child, against the father because the aliments are granted for a short period prior to the demand. ***Poissant & Barrette.*** M. Judgment confirming, 17 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 12.

The recommendation of the majority of the family council, touching the appointment of a tutor to a minor, should be homologated by the prothonotary, if there be no legal impediment or objection to such appointment, and other things being equal, the preference should be given to a paternal relative; and where the prothonotary followed the advice of one maternal relative of the minor in preference to that given by twelve paternal relatives, and no cause was shown why the person recommended by the paternal relatives should not be appointed, his decision was over ruled by the Court, and the choice of the paternal relatives adopted. ***Smith et al. & Baptist.*** M. Judgment

reversing, 22 June 1874. Rep. 23 J. 191. 9 Rev. Leg. 657.

Un tuteur ne peut être locataire des biens de son pupille (art. 290 C. C.)

Le tuteur qui a amélioré l'immeuble de son pupile ne peut réclamer la valeur des améliorations qu'il y a faites dans une demande distincte et séparée du compte qu'il lui doit et lorsqu'il a jouit de cet immeuble, qu'après déduction des fruits et revenus dont il doit aussi lui rendre compte.

Le droit du tiers d'enlever les améliorations faites par lui sur la chose d'autrui ne lui donne aucun privilège sur le prix de vente de cette chose. ***D'Orsonnens & Christin.*** M. Judgment reversing, 26 Septembre, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 4 Dec. d'A. 253. 14 Rev. Leg. 253.

Where an account has been rendered and accepted, the tutor cannot be called upon to render another account without asking to have the first account set aside. ***Desgroseilliers & Riendeau et vir.*** M. Judgment rsversing, 22 June. 1373. Dorion, C. J., Monk, Ramsay, Sauborn, Tessier, JJ.

Le tuteur dont la tutelle a été annulée, et qui a rendu un compte de son administration aux nouveaux tuteurs, qui lui ont succédé, et qui ont reçu les pièces justificatives, et le reliquat de compte reconnu par le rendant compte, n'est pas tenu de rendre un autre compte en justice, et que les nouveaux tuteurs qui n'ont pas accepté le compte qui leur a été rendu avec les formalités requises par la loi, n'ont d'action que pour débattre et faire reformer le compte présenté, et non une action en reddition de compte. ***Méthot & Dufort et vir.*** Q. Judgment reversing, 8 Oct., 1883. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 262.

ULTRA PETITA.—A person employed to repair railway carriages by changing them from platform trucks into passenger cars, cannot, being unpaid for his work, revendicate the cars so transformed as his property.

And having alleged they were his property, and demanding to be paid the value of the cars he cannot recover the value of the work which is not alleged nor prayed for. *Senécal & Peters.* M. Judgment reversing, 22 Sep., 1874. Monk. Taschereau, Ramsay, Sanborn, Sicotte, JJ. Rep. 7 Rev. Leg. 308.

ULTRA VIRES.—The powers of a local government under the B. N. A. Act, are co-extensive as regards the subject with those of the local legislature, so a Provincial Government has power to incorporate by letters patent a company for the purposes of navigation within the limits of the Province. *McDougall et al. & The Union Navigation Company.* M. 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 63.

The Dominion Parliament had a legal right to impose on the Superior Court, and the judges thereof the duty of trying controverted elections of members elected to the House of Commons of Canada. *Bruneau et al. vs. Massue.* M. Judgment rejecting Appeal 18 December, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 23 J. 60, 2 Leg. News 38, 9 Rev. Leg. 626.

An act of the Province of Quebec passed in 1872 (36 Vic., c. 12, sect. 3) limited the right of appeal in certain cases that had gone to the Court of Review, and it was *held* that this controlled the right of appeal in cases of insolvency, and that it was not beyond the powers of the local legislature to regulate by general rules the appeals to its Courts, provided such rules did not contravene a positive law regulating insolvency. *Studay & Angers.* M. Judgment, 1874.

The act of the Legislature of Quebec, 32 Vict., cap. 15, sect. 190, authorizing the Lieutenant Governor in Council to declare forfeit (for default to make repairs) the right of collecting tolls on any toll-bridge and to transfer the property therein was within the powers of the local legislature, and that the Orders in Council mentioned in this case ; forfeiting the right of exacting tolls for passing on a toll-bridge, which had been placed under the management of the Municipal Councils of Cleveland & Melbourne (Appellants) by Order of the Executive Council of the former Province of Canada, and transferring the control of the property to the Appellants, were not *ultra vires. The Municipality of the Township of Cleveland et al. & The Municipality of the Township of Melbourne & Brompton Gore.* M. 26 Feb., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 26 J. 1, 4 Leg. News 277, 1 Dec. d'A. 353.

La clause du Statut Provincial, 42-43 Vict., ch. 4, ordonnant la fermeture le dimanche de la maison dans laquelle il se vend des liqueurs spiritueuses, est une mesure disciplinaire et de police, et n'est pas *ultra vires* de la Législature Provinciale. *Poulin & La Corporation de Québec.* Q. Judgment confirming, 7 Dec., 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 7 Q. L. R. 337. 2 Dec. d'A. 103. Ramsay, J., thought the prohibition was improvidently issued, independently of the special question of legislative authority.

The tax imposed by the Act of the Legislature of the Province of Quebec,

43-44 Vict., cap. 9, sec. 9, to wit, a duty of 10 cents on each exhibit filed before the Superior Court, etc., such duty payable in stamps, is in consideration of a service to be rendered by an officer of the Government of the Province of Quebec, and for a merely local object in the Province (viz, for the maintenance of the administration of justice in the Province) ; and, moreover the tax in question is of a nature similar to those collected prior to Confederation for the purpose of maintaining the administration of justice, which have always been treated as local assets, and consequently the Act in question was not *ultra vires*.

The Attorney General & Reed. M. Judgment reversing, 24 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 26 J. 331, 5 Leg. News 497, 3 Dec. d'A. 33. The Chief Justice dissenting. This case was reversed in the Privy Council. (1).

A local Statute empowering a municipality to make by-laws prohibiting the sale of liquor, or allowing its sale under certain conditions, is not justified by sub-section 9, section 92, B. N. A. Act of 1867, even though the municipality only exercices the power to the extent of fixing a tax by way of licence, and for the purpose of revenue.

A Statute of the Legislature of the Province of Quebec (39 Vic., c. 7) enacted (Sect. 1) that " every assurer, carrying on in this Province, any business of assurance, other than that of marine assurance exclusively, shall be bound to take out a license, before the first day of May, in each year, from the revenue officer of the district wherein is situate his principal place of business or head agency, and to remain continually under license."

" The price of such license " was to consist of three per cent. on every fire policy, and one per cent. on every other policy, except marine policies. This price was to be collected by adhesive

(1) *See* APPENDIX.

stamps in the manner regulated by the Act.

Held by the whole Court that this was not a direct tax within the meaning of the British North America Act.

Held also, that the Statute was *ultra vires* of the Local Legislature, and null. *Angers, Attorney General & The Queen Insurance Company.* Judgment confirming. M. 14 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Taschereau, JJ. Ramsay, J., was of opinion that the statute was within the powers of the Local Legislature—that a license is a permit to do—that the price of a license or the form in which such price was imposed did not alter its character of license,—that there was nothing in the enumeration of the Statute to limit the kinds of license that might be imposed by a Local Legislature,—that the real test of power was the object of the tax, *i. e.*, to raise revenue for local purposes,—that the Local Legislature for such purposes could tax subject within the scope of Dominion Legislation,—and that the inconvenience of such an impost, as limiting the operations of trade, is not a consideration for our Courts, but for the Dominion Government. (1) Rep. 1 Legal News 3, 22 J. 307.

A local act which disposes of the property of a Corporation created by a federal law is constitutional. *Dobie & The Board of Temporalities.* M. Judgment confirming, 19 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, McCord, JJ. Ramsay, J. dissenting. Rep. 3 Leg. News 250.

NOTE.—This case went to the Privy Council, and was reversed. (2)

The Act of Parliament 42 and 43 Vict., c. 48, is invalid, not being within the powers of parliament, " it is not in the nature of an insolvency law, for it is intended to apply to all building so-

(1) Confirmed in Privy Council. *See* APPENDIX.

(2) *See* APPENDIX.

cieties, whether solvent or not. It is therefore essentially an act affecting civil rights, which under the provisions of the British North America Act, 1867, comes within the exclusive jurisdiction of the Local or Provincial Legislature. *McClannaghan & St. Ann's Mutual Building Society.* M. Judgment confirming, but not on the principle laid down by the Court below, 4 February, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J., concurred on the principle of the judgment except as to cost. *v.* COSTS. Rep. 3 Leg. News 61, 24 J. 162.

UNIVERSAL LEGATEE.—A woman *commune en biens* with her late husband, and *légataire universelle en usufruit* may bring an action against the partner of her late husband for an account of the partnership, without calling in the *nu-propriétaires.* 5 Dec., 1878. Sir A. A. Dorion, C. J. Monk, Ramsay, Tessier, Cross, JJ.

UNION OF CAUSES.— Lorsque les questions en litige et la preuve sont en substance les mêmes dans plusieurs causes, et que les Intimés sont aussi les mêmes, ces appels seront, sur motion, réunis pour n'en former qu'un seul. *Garth et al. & La Banque d'Hochelaga et al.* M. Motion granted, 21 September, 1886. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 14 Rev. Leg. 548.

USE AND OCCUPATION. — A party occupying premises without lease or *tacite reconduction* is liable to pay the value of the occupation and use of the premises. *Têtu & Garneau.* Q. Judgment, 7 September, 1874. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Bossé, JJ. Bossé, J., dissenting.

USUFRUCTUARY MUST MAKE AN INVENTORY.—*Nelson & Harrison.* M. Judgment confirming, September, 1876. Dorion, C. J., Ramsay, Sanborn, Tessier, JJ.

USUFRUITIER.—Décret sur l'usufruitier est nul. *Lavigne & MacNider.* M. Judgment confirming, March, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J., dissenting.

"The usufructuary cannot, at the cessation of the usufruct, claim indemnity for any improvements he has made, even when the value of the thing is augmented thereby." 462 C. C. *De Bonald & Dame Marie-Louise Barbier et al.* M. Judgment confirming, 23 January, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ.

The usufructuary has a right to the civil fruits of the property over which the usufruct is established, (447 C. C.) and the rent of houses is a civil fruit, but the transfer of the rents of houses as a security for a debt is not a cession of the usufruct, and the transferee cannot therefore maintain an opposition to the sale of the usufruct. *Moynaugh & Smith.* M. Judgment reversing, 25 September, 1886. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, JJ.

USURIOUS CONTRACT.—A simulated contract made to disguise a usurious contract is null. *Martel & Desilets.* Q. Judgment confirming, 7 December, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, JJ. Ramsay, J., dissenting.

UTENSILS OF A BREWERY ARE IMMOVEABLES.—The Appellant purchased at a Bailiff's sale, held under a writ of *fieri facias de bonis*, for taxes, certain moveable effects forming the plant of a brewery, (the proprietor of the brewery not objecting to the sale), and allowed the same to remain on the brewery premises on storage; the brewery was some months afterwards sold by the Sheriff under a writ *de terris*, the plant being still thereon, and adjudged to the Appellant.

The Appellant gave no notice of his claim on the goods, and filed no opposition to withdraw them, but, after the sale to Respondent, sought to revendicate them in his hands.

Held, dismissing the action, that the effects were immoveables by destina-

tion, and although the bailiff's sale had under the circumstances passed the property in the same to Appellant, yet as he had allowed his property to be virtually included in the sheriff's advertisement of a brewery, he had only himself to blame if an innocent purchaser of the brewery retained all the plant which he found thereon when it was adjudged to him. *Budden & Knight.* Q. Judgment confirming, 8 September, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 3 Q. L. R. 273.

V

VACANT SUCCESSION.—Un curateur à une succession vacante ne représente que la succession et le défunt, et qu'il ne peut demander la nullité d'un acte fait par le défunt en fraude de ses créanciers. Cette action n'appartient qu'aux créanciers. *Lamarche & Pauzé.* M. Judgment reversing, 31 Oct., 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. 3 Dec. d'A. 265.

VACATION.—*Judgment in*—Notwithstanding art. 469 C. P. C., the court cannot adjourn to any day between 9th July and 1st September (the long vacation) for the purpose of rendering judgment in cases heard and taken under advisement during term before such vacation.

Art. 469 C. P. C. only gives the court the right to adjourn for rendering judgment to a day upon which it is not prohibited by art. 1 C. P. C. from sitting, and that art. 1 C. P. C. in effect absolutely prohibits this. *The Richelieu Co. & Anderson.* M. Judgment reversing, 22 March, 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Reported 22 J. 219. 7 Rev. Leg. 625.

VALUATION ROLL.—To amend a roll of valuation is not to make a new roll. So although a local municipality has an unlimited power to revise and correct a roll of valuation, it has not power to substitute an amended roll for the new roll which it is obliged by law to make. *Morgan et al. & Coté et al.* M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Sir A. A. Dorion, C. J. and Tessier, J., dissenting. Reported 3 Leg. News 274.

Where the law requires three valuators and the valuation roll is made by three, only two of which were legally appointed, the roll will be set aside. *Rolfe et al. & The Corporation of the Township of Stoke.* M. Judgment reversing, 3 February, 1880. Sir A. A. Dorion, Monk, Ramsay, Cross, JJ. Rep. 24 J. 213 and 2 Leg. News 103.

VENDORS PRIVILEGE.—In accordance with a usage of trade at Montreal, Appellants borrowed from Brown, MacMinn & Co. a quantity of corn, depositing a sum of money as security for its return. Two or three days before the insolvency of the latter, Appellants returned the corn, but neglected to exact the re-payment to them of the money deposit. The corn was immediately afterwards sold by Brown McMinn & Co. and the proceeds of the sale subsequently collected by the assignee of their estate appointed under the Insolvent Act of 1869.

Held: That the Appellants had no lien or privilege on these proceeds for the amount of said unreturned money deposit. *Brown et al. & Angus et al.* M. Judgment confirming, 4 February, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 24 J. 1. 2 Leg. News 92.

VENIRE DE NOVO.—If the Plaintiff fails to appear when the cause is called for hearing he may be non-suited; but the non-suit may be set aside and *venire de novo* may be ordered, according to English practice, on payment of costs by Plaintiff. *Bain & White et al.* M. Judgment reversing, 22 Nov., 1881, Sir A. A. Dorion, C. J.

VICE DE CONSTRUCTION.—The iron founder who manufactures and places in position the girders and other iron sup-

ports of a roof, under a contract in which it is stipulated that he is not responsible for the design, and who executes his work according to the plans and specifications furnished him by the architect employed by the proprietor, is not liable for any damage caused by the falling of the roof, in consequence of the insufficiency of the design, plans and specifications of such girders and other iron supports. *The St. Patrick's Hall Association & Gilbert et al.* Judgment confirming, 29 January, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 23 J. J. 1 Leg. News 116. 9 Rev. Leg. 612.

VICE REDHIBITOIRE.—Crib-biting is a *vice redhibitoire*. The judgment of the court below held that Plaintiff knew of the *vice*. The Court of Appeal arrived at a different conclusion on the evidence. *Drolet & Laperrière.* M. Judgment reversing, 16 September, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Rep. 12 Rev. Leg. 359.

Donihee & Murphy. M. Judgment confirming, 4 February, 1879. Sir A. A. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 94.

Where there is an exchange of horses and a *bon given* as *soulte*, on an action on the *bon* Defendant cannot set up by exception a *vice redhibitoire* of the horse received by him, unless he has used reasonable diligence to set aside the exchange (1530 C. C.) and the maxim *quæ sunt temporalia ad agendum sunt perpetua ad excipiendum*, does not apply. *Poupart & Verronneau.* Judgment confirming, 29 Jan.. 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

There is no special time for instituting the action redhibitoire under the Code. It must be brought with reasonable diligence according to usage. *Lanthier & Champagne.* M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J. dis.

VILLAGES. — Aux termes du Code Municipal (34 Vict., c. 68, art. 19, § 3) les "municipalités locales" comprennent les municipalités de villages.

L'article 27 du même code ne fait qu'indiquer quelles municipalités rurales seront considérées comme municipalités locales, sans égard aux municipalités de villages, qui tombent sous la règle générale établie par l'art. 19, § 3.

Par conséquent une compagnie dûment incorporée en vertu de l'acte 33 Vict., c. 32, avait le droit d'empierrer un chemin de front dans les limites d'une municipalité de village, d'y poser des barrières et d'y percevoir des péages.

En vertu du dit acte, une telle compagnie a le droit d'exiger un péage pour une fraction de mille parcourue, pourvu que sur toute la longueur du chemin parcouru le taux n'excède pas le montant par mille fixé par la cédule B, du dit statut. *La Cie. du Chemin de Péage de la Pointe-Claire & Leclerc.* M. Judgment reversing, 9 December, 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Baby, JJ. Rep. M. L. R. I. Q. B. 296.

VIS MAJOR.—It is incumbent on a party alleging *force majeure* as a justification to prove it. So when a clerk was entrusted by his employer with money to make purchases, and he could not produce the money and said it had been stolen from him, he was held liable for the money, failing to prove that it had been stolen from him, and that he had used due diligence to protect it. *Gravel & Martin et al.* M. Judgment confirming, June, 1874. Taschereau, Ramsay, Sanborn, Loranger, JJ. Taschereau, J. dis.

Fire is not necessarily presumed to be *force majeure*. *The Canadian Navigation Company & McConkey.* M. Judgment confirming, 14 Dec., 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 1 Leg. News 23.

W

WAGES.—In an action for wages by domestics or farm servants in the absence of written proof, the master may offer his oath as to the conditions of the engagement, and as to the fact of the payment, accompanied by a detailed statement. If the oath be not offered by the master it may be deferred to him, and is of a decisory nature as regards the subjects to which it is limited. 1669 C. C.

Le maître qui renvoie son engagé, sans raison suffisante, sera condamné à lui payer des dommages égaux au montant perdu par l'engagé pendant le temps pour lequel il n'a pas été employé, aussi à la différence des gages par lui gagnés ailleurs. *Robinson & McMillan.* M. Judgment confirming, 24 April, 1885. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J. dis. Rep. 13 Rev. Leg. 565.

WAGES AS CLERK.—*A case of evidence.—McArthur et al. & Dorion.* M, Judgment confirming, 18 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

WALL.—Where the Plaintiff's wall is not plumb but leans over his neighbour's land and the neighbour also builds a wall which, following the inclination of Plaintiff's wall, is raised above it, and is terminated so as to make it appear plumb, an action will be dismissed which claims indemnity from the builder of the second wall. *Quinn & Leduc.* M. Judgment reversing, 27 May, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 6 Leg. News 287.

Campbell & McKinnon.—As to indemnity for superstructure, and meaning of "Heberge." M. Judgment confirming, 27 January, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Ramsay, J. dis. as to works not existing when the Defendant settled with Plaintiff for superstructure.

WAREHOUSEMAN.—By the Statute 34 Vict., c. 5, s. 48. the owner of goods giving a warehouse receipt as a warehouseman is put in the same position as any other warehouseman so doing. *The Molson's Bank & Lanaud.* M. Judgment reversing, 22 November, 1881. Sir A. A. Dorion, C. J., Ramsay, Tessier. Cross, Baby, JJ. Rep. 5 Leg News 263. 2 Dec. d'A. 182.

WAREHOUSE RECEIPT.—A document in the form following was a warehouse receipt, and not a mere delivery order:

"Received from Ritchie, Gregg, Gillespie & Co., on storage, in yard Grey Nun street, the following merchandise. viz:

"(300) Three hundred tons No. 1 Clyde pig iron, storage free till opening of navigation.

"Deliverable only on the surrender of this receipt properly endorsed.

"Montreal, 6th March, 1873. Thomas Robertson & Co."

The parties signing the above warehouse receipt, unpaid vendors of the iron, could not pretend that it was not a warehouse receipt inasmuch as they were not warehousemen, as against a holder of such receipt in good faith.

Such warehouse receipt may be transferred by endorsement as collateral security for a debt contracted at the time. in good faith, the pledgee having no notice that the pledgor is not authorized to pledge, the proof of such knowledge being on the party signing the receipt.

An obligation contracted at the time may be made to cover future advances.

but not past indebtedness. *Robertson et al. & Lajoie.* M. Judgment confirming, 29 January, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Cross, J. dis. Rep, 22 J. 169, 1 Leg. News 100.

It is not necessary that a copy of the declaration in an action of revendication should be served by a bailiff at the Prothonotary's office; it is sufficient that a copy be filed at the office.

Warehouse receipts granted without authority by the president and secretary of a company not doing business as warehousemen are invalid. *Hearle & Rhind.* M. Judgment confirming, 29 January, 1878. Reported 22 J. 239. 1 Leg. News 101.

WARRANTY.—The description of a lot of land bounded on one side by "Belmont Avenue", when in fact there is no such avenue in existence, but only an avenue projected by a neighbouring proprietor, is not a warranty that such avenue will be made. *Wood & St. Germain, et al.* M. Judgment confirming, 24 Nov., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

The warranty "to go out in tow" in a policy of insurance, without its being specified how far, is complied with by the towing of the vessel out from the wharf where she was lying, the expression not being technical, and having no special meaning by usage in the port of Quebec. *Connolly & The Provincial Insurance Company.* Q. Judgment reversing, 7 December, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Monk and Cross, JJ. dis. Rep. 1 Leg. News 33 and 43.

NOTE.—This case was reversed in the Supreme Court, 5 S. C. Rep. 258.

An imperfect wooden drain, connecting the closets and sinks of a house with the common sewer in the street of a city, is a latent defect against which the seller is obliged by law to warrant the buyer, where, from the character of the house, the buyer had reason to believe that the drains were constructed in a proper manner. *Ibbotson & Ouimet.* M. Judgment reforming, 21 Dec., 1876. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 53.

A note payable on demand, given to a bank to secure an overdrawn account of the maker, as well as to secure the forbearance of the bank for other advances, must be considered in the light of a continuing guarantee, and that the endorsers of such a note are not relieved from their liability by the fact that the bank did not make a demand of payment till after the insolvency of the maker, about twenty-seven months after the date of the note. *The Merchant's Bank & Whitfield.* M. Judgment reversing, 23 Sep., 1881. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 2. Dec. d'A. 157.

A guarantee given to a Bank, which afterwards was amalgamated with another Bank, did not bind the guarantors towards the consolidated Bank *The Consolidated Bank & The Merchant's Bank.* M. Judgment confirming, 27 May, 1882. Sir A. A. Dorion, C. J., Monk, Ramsay. Cross, Baby, JJ. Monk, J. dissenting. Rep. 6. Leg. News 284.

An undertaking to give a party an introduction to a firm of responsibility and standing is to be understood a firm having that standing at the time of the introduction, and it is not a guarantee of continued solvency. *Brown & Gordon et al.* M. Judgment confirming, 19 Jan., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 5 Leg. News 300.

Un défendeur, dans une cause, peut appeler en garantie une seule des personnes, tenues conjointement et solidairement à la garantie, et qu'il n'est pas tenu, avant de procéder contre l'un d'eux, ou plusieurs d'entre eux, de mettre en cause tous les garants tenus conjointement et solidairement. *Ross et al. & Ross.* Q. Judgment reversing, 7 May, 1884. Sir A. A. Dorin, C. J., Monk, Ramsay, Cross, Baby, JJ. Monk, J. dis. Rep. 14 Rev. Leg. 1.

The order to "give bearer what he wants" does not contain a continuing guarantee. *Lacroix & Bulmer.* M. Judgment reversing, 16 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 21 J. 327.

Continuing—v. McGreevy & Mayrand. Judgment confirming, 7 June, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

V. Foley et al. & Cross et al. M. Judgment, 22 March, 1876. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ.

WATER COURSE.—A boundary ditch is not a water-course. See articles 420, 424, 867, 882 M. C. *Dastous & Nolan.* Q. Judgment confirming, 8 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

Although it is within the attributes of municipalities to make by-laws and *procès verbaux* for the opening of water-courses, and a person injured thereby may have exercised his right of appeal to the county council, and the *procès-verbal* has been confirmed by the county council, nevertheless such confirmation is not a bar to an action to set aside the *procès-verbal*, where it orders something to be done which is in itself contrary to law. And so, where the effect of a water-course established by *procès-verbal* was to aggrevate greatly the servitude which the Plaintiff's land had to bear owing to its being lower than that of his neighbours, it was *held*, that he was entitled to bring suit to have the *procès-verbal* set aside, although he had appealed previously to the county council and the *procès-verbal* had been confirmed thereby. *La Corporation de la paroisse de Ste. Anne du Bout de l'Isle & Reburn.* M. Judgment confirming. 26 Nov., 1884. Monk, Ramsay, Tessier, Cross, JJ. Ramsay, J. dissenting. Rep. M. L. R. I. Q. B. 200, 4 Dec. d'A. 192, 8 Leg. News 67.

WATER POWERS AND USE OF WATER. —*Waste.* — A question of evidence *Doutre & Robert.* M. Judgment confirming, December, 1874. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Taschereau, J. dissenting.

WAY-BILL.—A way-bill by common carrier for goods may be transferred by endorsement, like a bill of lading. Being so transferred, and the carrier being notified of the transfer, the goods can only be delivered to the holder.

The agent of a Railway Company in charge of one of its stations, will be presumed to be authorized to give such way-bill (styled "shipping bill" in the formed used), and the company will be bound by his acts in this respect. *The Grand Trunk Railway Co. & Shaw.* Judgment confirming that of Superior Court, December, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

WIDOW.—A widow had a direct interest in a suit regarding her late husband's estate but was not a party to the suit, which was between the executors, intervening, and a third party. She was examined as a witness. The court declined to express any opinion as to her competence to be a witness, as with her evidence there was not sufficient to reverse. *Cruice et al. & Darmody.* Judgment confirming, Dec., 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

WIFE.—A married woman may validly renounce her priority of hypothec in favor of a third person who is lending money to her husband on the security of his real estate.

Such renunciation in favour of a third party does not deprive the wife of her rights against other mortgage creditors inferior in rank to herself. *La Société de Construction Montarville vs. Cousineau & vir.* M. Judgment confirming, 3 Feb., 1880. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 329.

A married woman who appeals must be authorized, and an appeal brought without authorisation will be rejected. *St. Jean & The Metropolitan Bank.* M. Judgment rejecting appeal, September,

1874. Monk, Taschereau, Ramsay, Sanborn, JJ.

Where goods are sold to the husband and credit is given to him, his wife separated as to property will not be held liable. The case of *Hudon et al. & Marceau*, referred to 23 J. 45. *Paquette & Guertin et al.* M. Judgment confirming, 14 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 2 Leg. News 210.

A wife *séparée de biens* is not liable for the price of necessaries furnished to the husband, and on his credit.

Nor can she become liable by endorsing his promissory note given in payment of such effects. *Bruneau & Barnes et vir.* M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J. Monk, Ramsay, Cross, JJ. Monk, J., dis. Rep. 3 Leg. News 301, 25 J. 245.

Can a married woman bind herself with her husband and how? Can she renounce to her reprises?—These questions were raised in *Panet & Hamel* but not decided. Q. December, 1874. Dorion, C. J., Monk, Ramsay, Sanborn, McCord, JJ.

A married woman, authorized by her husband, can bring an action of damages in her own name for personal wrongs. *Dame Sarah Ann Waldon et vir. & Dame Maria White et vir.* Judgment confirming, 30 June, 1886. Monk, Ramsay, Tessier, Cross, Baby, JJ.

A married woman is liable on an obligation entered into by her with a party in good faith to borrow money, although the money be employed to pay her husband's debts. *Martel & Prince.* Q. Judgment, 6 March, 1877. Monk, Ramsay, Sanborn, Tessier, JJ. Monk, J., dis. Rep. 8 Rev. Leg. 138.

La femme mariée sous le régime d'exclusion de communauté, peut emprunter, avec l'autorisation de son mari, et que l'obligation qu'elle contracte pour le capital et les intérêts n'est pas prohibée par l'article 1301 C. C. *Ross & La Société Permanente de Construction.* Q. Judgment confirming, 4 Dec., 1882. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 12 Rev. Leg. 130.

WILLS.—A case of evidence as to insanity. *Dixon et al. & Close.* M. Judgment confirming, Dec., 1874. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ.

Where a testator makes a will while labouring under the effects of *delirium tremens*, and dies shortly afterwards, the will will be declared invalid. *Chapleau et vir. & Chapleau.* Judgment confirming, 18 Sep., 1878. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

Question of fact as to condition of testatrix when will made.—Evidence that she dictated the will, and that the universal legatee had accepted the succession. *Bilodeau & Turcotte.* Q. Judgment reversing, 5 Oct. 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Where by will there is a reasonable and ordinary disposition of property by a mother to her children it will be an indication that the testament expresses the real intention of the deceased. And although the testatrix bequeaths her property to her husband, charged with obligations to their children, this will not be considered as differing materially from the intention expressed on other occasions by the testatrix that she intended to leave her property to her children. *Coutu & Coutu et al.* M. Judgment confirming, 24 Nov., 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Undue influence.—Dorion & Dorion. Judgment confirming, 22 June, 1876. Monk, Ramsay. Sanborn, Tessier, Sicotte, JJ. Sicotte, J. dis. Rep. 9 Rev. Leg. 97.

Insanity.—Undue influence.—A case of evidence. *Turner et al. & Turner et al.* M. Judgment confirming, Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Monk, J. dis.

Obtained by fear.—Question of evidence. *Coutu & Coutu et al.* M. Judgment confirming, 24 Nov., 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ.

Property bequeathed declared "insaisissable." — Where property was bequeathed with the condition that it should be unseizable, and was substituted to the children of the heirs, and the executors sold a portion to one of the heirs, *held*, that the effect was to make a partition, and the revenues of said property were unseizable, and the *grevé* who had borrowed on the security of such property is not estopped from pleading the *insaisissabilité* of the revenues. *Molson & Carter.* M. Judgment reversing, 24 March, 1883. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Ramsay, J. dissenting thought that the *grevé* was precluded from setting up his own fraud.

But the wife and children *grevés*, who intervened, had no interest as to the revenues accrued during the life time of the *grevé*. *Holmes & Carter.* M. Judgment confirming the same day and before the same judges. Monk, J. dis. Rep. 6 Leg. News 372. 3 Dec. d'A. 279.

The terms of the will in question in this case were so comprehensive that the executor could endorse accommodation promissory notes which would be binding on the estate of the testatrix.

Said notes being so binding, the property of the estate could be seized and sold for their payment, notwithstanding a clause in the will that none of the property of the testatrix could be seized and sold, except for debts recognized as such by her actual signature or to which she was actually a party. *Lionais et al. & The Molson's Bank.* M. Judgment confirming, 20 September, 1882. Monk, Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ. dis. Rep. 26 J. 271. 5 Leg News 364. 2 Dec. d'A. 194. Reversed in the Supreme Court.

Legacy to husband and wife by the parent of one of them.—Un legs d'immeubles fait aux deux conjoints par

mariage, par l'ascendant de l'un d'eux, est censé fait à l'époux survivant seul, et non aux deux conjointement à moins d'une déclaration expresse à cet effet. (Art. 1276 C. C.) *Dubois et ux. & Boucher.* Q. Judgment reversing 8 October, 1883. Sir A. A. Dorion, C.J., Ramsay, Tessier, Cross, Baby, JJ. Rep. 3 Dec. d'A. 241.

Insanity.—Eccentricity is not proof of insanity, nor can it be deduced from a subsequent interdiction that the testator was insane at the time of his making the will. *Russell & Lefrançois.* Q. Judgment confirming, 4 February, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. The Chief Justice dis. Rep. 2 Dec. d'A. 245. This case was reversed in the Supreme Court.

Exercise of power under will.—A wife *commune en biens*, constituted by will her husband her universal legatee, charging him to return her real estate, either by donation *entre vifs* or by will, to such of her children or grand-children as he might select, subject to such charges as he might impose. The husband by his will, without refering to his wife's will, appointed three of his grand-children his universal legatees, and substituted to them some of his great grand-children. *Held*, that this was a valid exercise of the power conferred on him by the wife's will, great grand-children being included in grand-children, and the husband moreover, having power to impose charges. *Roy & Pineau.* Q. Judgment reversing, 6 Leg. News 10. 3 Dec. d'A. 146.

Where an estate was devised to A, in trust, with power to divide among A's children in such proportion as A should appoint by his will, and in default of such appointment the estate to go to the children share and share alike: *Held*, that an appointment by will to certain of the children, to the entire exclusion of one or more, was a valid exercise of the power. *Abbott et al. & McGibbon.* M. Judgment reversing, 19 May. 1884. Sir A. A. Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. Rep. 7 Leg. News 179.

A will declared null as a will in notarial form, may be invoked and declared good and valid as a will in the form derived from the laws of England. A will made by a person who has lost the faculty of *remembering words*, but whose intellect remains unimpaired as to things, will be maintained by the Court. ***Marquis & Marquis.*** Q. Judgment confirming, 4 March, 1875. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Plamondon, JJ. Reported 1 Q. L. R. 50.

A holograph will, on the face of which appear certain over-writings, changes and alterations of an immaterial character, will not be set aside, and specially so in the absence of satisfactory proof that they were made by some person other than the testator. *Darling & Templeton.* M. Judgment confirming, 22 December, 1874. Monk, Taschereau, Ramsay, Sanborn, Sicotte, JJ.

The ordinary provision in a will, that all the testator's just debts, funeral and testamentary expenses be paid by his executors as soon as possible after his death, is not such an order or direction as would exempt the particular legatees from paying such hypothec to the exoneration of the testator's general estate. *Harrington et al. & Corse.* M. Judgment reversing, 24 March, 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ. Tessier, Cross, JJ. dis. Rep. 26 J. 79, 5 Leg. News 148.

WINTER ROADS.—*v.* PENALTY.

WITNESS. — Is the widow a good witness to prove a conversation with her late husband in a suit to which his estate is a party?

Is a party directly interested in the result of a suit, a competent witness in the suit, as for instance the legatees in the suit brought by executors to recover property subject of the legacy? *Cruice et al. & Carmody.* M. December, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ.

The testimony of the notaries, before whom a deed has been executed, to the effect that essential formalities, which on the face of the deed appear to have been accomplished, were not so, if alone and uncorroborated, is insufficient to establish that the deed is *faux. Larochelle & Proulx.* Q. Judgment confirming. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Taschereau, J. dissenting. Reported 1 Q. L. R. 142.

In an inscription *en faux* against the Sheriff's deed, it was held: That the inscription *en faux* filed by said Marie Marguerite Elizabeth Hill against the Sheriff's deed to François Ouellet was unfounded and that said deed could not be proved false by the evidence of the officer who executed the same to the disparagement of the rights of third parties, acquired in good faith under said deed. *Tremblay & Hill et al.* Q. Judgment reversing, 4 March, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ. Monk, Ramsay, JJ. dissenting.

The declaration by the notaries that a testator is of unsound mind is not conclusive evidence of the fact, and the notary who received the will may be examined as a witness. *Dixon & Close.*

Where by a simulated deed a claim is transferred to a nominal Plaintiff the real Plaintiff cannot be a witness to establish the claim. *Bernier & McGreevy.* Q. Judgment confirming, 6 Feb., 1882. Sir A. A. Dorion, C. J., Ramsay, Tessier, Cross, Baby, JJ.

Semble, a person who is garant of one of the parties, and also responsible for the action, although not nominally a party to it, cannot be examined as a witness. *Dumont & Aubert.* Q. Judgment confirming, 7 June, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Reported 5 J. 295. 10 Rev. Leg. 576.

WOOD CUT ON LAND AFTER SEIZURE. —Where it appears that the party accused under 646 C. C. P. did not know of the seizure, and was not a trespasser, but that he cut the wood under

an agreement with the owner of the land entered into long before the seizure, the rule will be dismissed. *Cloutier & Cinq-Mars et al.* Q. Judgment confirming, 5 June, 1877. Sir A. A. Dorion, C J., Monk, Ramsay, Sanborn, Tessier, JJ.

Work done without the consent or knowledge of the Defendant, and which does not turn to his profit, cannot form the basis of an action; but the Plaintiff will be allowed to take away his materials without doing damage to Defendant's property. *Pilon et al. & Lepage.* Q. Judgment confirming, 5 December, 1876. Monk, Ramsay, Sanborn, Plamondon, JJ. Rep. 7 Rev. Leg. 603.

WRIT.—*Alias, capias, exception à la forme.*—On the 5th December, 1876, the Appellant was arrested on a *capias* issued on the 2nd December. Finding that through the delay to execute the writ, a sufficient delay for the return was not allowed, the Plaintiff took out an *alias* writ, returnable on the 18th December. *Held,* (confirming the judgment of the court below rejecting the *exception à la forme* filed by the Appellant) that the proceeding was valid. *Richard & Wurtele.* Q. Judgment confirming, 7 December, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A writ of appeal may be amended. *Côté & Leclerc.* Q. Judgment, 5 June, 1875. Dorion, C. J., Monk, Taschereau, Ramsay, Sanborn, JJ.

WRIT OF POSSESSION.—The *adjudicataire* may have a writ of possession after the expiration of a year and a day from the adjudication. *Bourke & Langlois.* Q. Judgment, June, 1879. Rep. 2 Leg. News 202. 10 Rev. Leg. 560.

Can the *adjudicataire* have a writ of possession after the year and day from the adjudication? *Burke & Langlois.* Q. Judgment confirming. 5 June, 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 10 Rev. Leg. 560. 2 Leg. News 202. But the question seems not to have been decided either in review or in appeal.

WRIT OF PROHIBITION.—A writ of prohibition must be supported by evidence of proceedings having been taken which are to be prohibited. So, where a petition for a writ of prohibition to stop the proceedings of a person acting judicially under the authority of an act is not accompanied by a copy of the warrant complained of or by an affidavit that it could not be procured, it will be dismissed. *L'Hero & Sioni et al.* Q. Judgment confirming, 6 December, 1879. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A writ of prohibition will lie to restrain a corporation from exercising a quasi-judicial power. *Morgan & Coté.* M. Judgment reversing, 22 June, 1880. Sir A. A. Dorion, C. J. Monk, Ramsay, Tessier, Cross, JJ. Dorion, C. J., Tessier, J. dis. Rep. 3 Leg. News 274.

A writ of prohibition will not lie to restrain an inferior tribunal unless it appears clearly that such court has no jurisdiction in the matter. *Bergevin & Rouleau et al.* M. Judgment confirming, 21 September, 1878. Sir A. A. Dorion, C. J., Monk, Ramsay, Tessier. Cross, JJ. Rep. 23 J. 179.

Prohibition will not lie to correct a bad judgment, or a simple excess of jurisdiction. It is the remedy where a Court arrogates to itself jurisdiction it has not. *Simard & The Corporation of the County of Montmorency.* Q. Judgment confirming, 7 June, 1878. Dorion. C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 8 Leg. News 546.

Writ of prohibition does not lie where no excess of jurisdiction appears on the face of the proceedings. *The Mayor of Sorel & Armstrong.* M. Judgment reversing, 21 December, 1875. Dorion, C. J., Monk, Ramsay, Sanborn, JJ. Ramsay, Sanborn, JJ., dissenting from the judgment, but not from the general principle in the above holding. Ramsay, J., said: "I assent most willingly to the proposition that generally an erroneous judgment does not lay a court open to prohibition, but it is quite different where, as in this case, the

right and the jurisdiction depend entirely on the absence of *error.*" Rep. 20 J. 171, 2.

Writ of prohibition refused because the petition contained words injurious to the judge to whom it was presented. On appeal the judgment was confirmed. *Champagne & Bélanger et al.* Q. 8 March, 1877. Sir A. A. Dorion, C. J., Monk, Ramsay, Sanborn, Tessier, JJ. Rep. 9 Rev. Leg. 328.

Writ of prohibition will be refused if the papers produced do not show the assumption of jurisdiction.

A motion to produce the necessary documents will not be granted. *L'Hero & Sioni et al.* Q. Judgment confirming, 6 Dec. 1879. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ.

A writ of prohibition may issue so long as there is any proceedings to prohibit. Prohibition will lie if it appears that the council of the bar has suspended an advocate from his functions without cause. *O'Farrell & The Bar of Quebec.* Q. Judgment reversing.

Where the conclusions are of a writ of injunction, and injunction is the proper remedy, its being called a writ of prohibition is of no consequence under our system. *The Mayor of Iberville & Jones et al.* M. Judgment confirming, 22 June, 1880. Dorion, C. J., Monk, Ramsay, Tessier, Cross, JJ. Rep. 3 Leg. News 277.

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PRIVY COUNCIL CASES.

JUDGMENTS IN PRIVY COUNCIL

—ON—

ALL CASES REFERRED TO IN THE BODY OF THIS WORK AND IN WHICH APPEAL WAS EITHER MEDIATELY OR IMMEDIATELY TAKEN TO HER MAJESTY.

PRIVY COUNCIL, 1874.

26th November, 1874.

Abbott & Fraser.

Coram THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, AND SIR ROBERT P. COLLIER.

J. J. C. ABBOTT ET AL., *v.* J. FRASER ET AL.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH :

The questions in this appeal relate to the validity of a devise in the will of Mr. Hugh Fraser, a merchant of Montreal, by which he devoted the bulk of his property, moveable and immoveable, to the purpose of establishing at Montreal an institution, "to be called 'The Fraser Institute,' to be composed of a free public library, museum, and gallery."

The will bears date the 23rd of April, 1870, and Mr. Fraser died on the 15th of May in that year.

The devise in question is in the following terms :—

"I give, devise, and bequeath the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Hon. John J. C. Abbott, and to the said Hon. Frederick Torrance, hereby creating them my universal residuary fiduciary legatees ; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely, to establish at Montreal, in Canada, an institution to be called "the Fraser Institute" to be composed of a free public library, museum, and gallery, to be open to all honest and respectable persons whomsoever, of every rank in life without distinction, without fee or reward of any kind, but subject to such wholesome rules and regulations as may be made by the governing body thereof from time to time, for the preservation of the books and other matters and articles therein, and for the maintenance of order ; and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose

Abbott & Fraser.

intended by me, namely, to the diffusion of useful knowledge, by affording free access to all desiring it to books, to scientific objects and subjects, and to works of art; and to the procuring such books, subjects and objects, as far as the revenue of my estate will serve, after acquiring the requisite property and erecting appropriate buildings, and after paying expenses of management, making always the acquisition and maintenance of a library the leading object to be kept in view. And it is my desire that three persons should be named by my said trustees to compose with them the first board of governors of the Fraser Institute, which it is my desire shall always be composed of five persons, professing some form of the Protestant faith, with power to them to supply any vacancy caused by death or resignation, or by crime or offence, the conviction whereof shall vacate the tenure of office of the offender. And it is further my will and desire that my friend the Hon. John J. C. Abbott shall be the first president of the Fraser Institute, and shall retain that position during his life. And so soon as the requisite charter shall have been obtained, containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall be forthwith conveyed over to the corporation, to be thereby formed, to be called the "Fraser Institute," for the purposes herein declared. In order to prevent any difficulty arising in the conduct of the business of the trust hereby created, it is my will and desire that Mr. Abbott, as the senior trustee, shall have a second or decisive voice, in the event of any difference of opinion between him and his co-trustee; and in the event of a vacancy occurring in the said trust from any cause whatever, whereby the number of trustees is reduced from time to time to one, it shall be the duty of the other, and he is hereby authorized to name a trustee to fill the vacancy so occurring, by a notarial instrument to that effect, and thereafter the senior trustee shall have a second or decisive casting vote, in case of difference of opinion. And I hereby confer upon my executors hereinbefore named full power to settle and adjust all matters connected with my moveable property, and upon my trustees hereinbefore named power to sell and realize such of my estate and effects as they shall deem expedient, to acquire property wherein to construct suitable buildings, and to construct such buildings, and to proceed in all respects with all diligence in the carrying out of my desires hereinbefore expressed, up to such time as the property and estate hereby devised to them shall be conveyed over to the Fraser Institute. I desire that the term of office of my executors be continued beyond the term limited by law, and until the duties hereby imposed upon them in the payment of special legacies be completed."

The suit which gives occasion to this appeal was brought by the respondent, as the heirs and representatives of the testator, to set aside the above bequest. The Judge of the Superior Court, Mr. Justice

Beaudry, dismissed the suit, but this decree was by a majority of three Judges to two, reversed on appeal by the Court of Queen's Bench. Abbott & Fraser.

The principal objections to the validity of the gift, relied on at the bar, were :—

1. That dispositions by will made to found a corporation were prohibited by law, and the whole devise, therefore, failed. In support of this objection, the 2nd article of an edit of Louis XV, published in 1743, which, it was contended, had still the force of positive law, was relied on.

2 That if this were not so, the devise of the immoveable property was void, as being a gift in mortmain.

3. That the gift was to a society of persons, the Fraser Institute, and that the society not being in existence at the death of the testator, the whole gift failed.

The Civil Code (which was promulgated before the date of Mr. Fraser's will) is the primary source from which the law of Lower Canada is now to be drawn. When this Code contains rules on any given subject complete in themselves, they alone are binding, and cannot be controlled by the pre-existing laws on the subject, which can then be properly referred to only to elucidate, in cases of doubtful construction, the language of the Code. On the other hand, when the Code refers to existing laws, not formulated in its articles, or in so far as on any subject it is silent, inquiry is permissible into the old law, and it will in many cases become a question of construction what and how much of that law remains in force, or is abrogated as being contrary to or inconsistent with the provisions of the Code. (See Article 2613.)

The general power of testamentary disposition is found in Article 831 of the Code.

" Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favor of his consort or of one or more of his children, or of any other person capable of acquiring and possessing and without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

The restriction mentioned in the Code relating to corporations is contained in Article 836.

" Corporations and persons in mortmain can only receive by will such property as they may legally possess."

The capacity of persons to acquire by testamentary disposition is subsequently defined in a series of articles under the head, " Of the capacity to receive and give by will." (Title 2, ch. 3, sect. 1.)

The Code appears to embody the legislation, having for its object the freedom of testamentary disposition, which was contained in the Quebec Act, 14 Geo. 3, c. 83, and the Provincial Statute 41 Geo. 3, c. 4·

Abbott & Fraser.

It was held by this tribunal in a late case (King v. Tunstall et al. (1), that the combined effect of these statutes was to abrogate the old law which prohibited gifts by will to adulterine children.

Art. 869 was also strongly relied on by the appellants, as being specially designed to meet such a bequest as the present. It is as follows:—

"A testator may name legatees, who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law. He may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

It could not be denied that the establishment of a public museum, library, and gallery, was in itself, and apart from the manner of its foundation, "a lawful purpose." But it was contended for the respondents that, as the disposition of the property in favor of the institution was ultimately to be carried into effect by means of a corporation to be thereafter created, the purpose to be thus carried into effect was not "within the limits permitted by the law."

It is to be observed that the testator does not attempt to create or found a corporation, but having devised his property to trustees to establish the institute, directs them to procure for that purpose legal incorporation by means of a charter or an Act of Parliament.

Now there is no express prohibition to be found in any article of the Code against such a testamentary disposition; although there are express provisions defining the restrictions and disabilities to which corporations are subject with regard to acquiring and holding immoveable property.

Thus Art. 836, already cited, which is found in the chapter on wills, allows corporations to receive by will only such property as they may legally possess.

Then, under the head of "Disabilities of Corporations," is—

"Art. 366. The disabilities arising from the law are—

"1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

"3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain, or belonging to corporate bodies, particular formalities, not required by the common law."

The counsel for the respondents, however, did not rely on this part

(1) P. C. p. 55.

of the case upon the provisions of the Code ; but insisted, and this was their main contention, that the second article of the King's Edict of of 1743 was still in force, and rendered the whole devise null. Abbott & Fraser.

That article is as follows :—

" Défendons de faire aucunes dispositions par acte de dernière volonté pour fonder un nouvel établissement de la qualité de ceux qui sont mentionnés dans l'Article précédent, ou au profit des personnes qui seraient chargées de former le dit établissemcnt, le tout à peine de nullité ; ce qui sera observé quand même la disposition serait faite à la charge d'obtenir nos lettres patentes."

The establishments mentioned in the preceding article are—

" Aucune fondation ou nouvel établissement de maisons ou communautés religieuses, hôpitaux, hospices, congrégations, confréries, colléges, ou autres corps ou communautés ecclésiastiques ou laïques."

It was contended that, notwithstanding the statutes relating to wills already referred to and the Code, this edict was still the governing law upon the subjects to which it relates, and in support of this contention, some decisions in the Canadian Courts, and the case of *Chaudière Gold Mining Co.* v. *Desbarats and others* (1), recently before this tribunal were referred to.

The question in these cases, however, turned upon the capacity of existing corporations to acquire and hold immoveable property without the licence of the Crown. Art. 10 of the edict prohibited such acquisition without the express permission of the king, signified in a particular manner, viz., by his letters patent registered in his *Conseils Supérieurs* of the province. But in their Lordships' view it is not necessary to resort to this article of the edict for the law on the point decided in the cases referred to. Art. 366 of the Code contains in itself a distinct rule on the subject. It no doubt refers to " the general law of the country respecting mortmain and bodies corporate ; " but it at the same time interprets that law by the following words : " Prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown." This general law may have been originally founded on the tenth article of the edict, but the law is now virtually contained in the Code itself, into which the article of the edict has been transferred.

In the case of the *Chaudière Gold Mining Co.* v. *Desbarats* (1), indeed, the counsel on both sides argued on the assumption that Art. X. of the edict was still in force. But their Lordships were then much disposed to take the view that the Code was, on the question then under discussion, declaratory of the law.

It is said in the judgment :—

(1) Law Rep. 5 P. C. 277.

(1) See Law Rep. 5 P. C. 277.

Abbott & Fraser.

"Their Lordships, however, cannot consider it to be their duty at this day to construe the edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity."

It is true that Arts. I. and II. of the edict are not in like manner reproduced in the Code; but the question arises whether, even if they survived the cession of the province to the English Crown, they continue to have, since the Statutes on Wills above referred to and the Code, the force of law.

It is open to considerable doubt, whether the first nine articles of the edict, which all relate to the foundation of corporations, retained the force of law after the cession; first, because the forms and regulations they prescribed than became out of place; and, secondly, for the substantial reason that the articles, which had for their object to put fetters on the king's own power, could not, it may fairly be contended, be of force to control the sovereign will of the English Crown whose prerogative it would be, after the cession, to establish corporations. And it is to be observed that no instance has been shown where, since the cession, the law of these articles has been put in force.

But however this may be, their Lordships cannot but think that the second article of the edict is abrogated by the Code, as being contrary to or inconsistent with its provisions.

The free testamentary power of disposition in Art. 831 is given, "saving the prohibitions, restrictions, and causes of nullity *mentioned in this Code.*"

It has already been observed that no restriction directed against such bequest as the present is to be found in the Code, unless the prohibitions relating to gifts of immoveable property in mortmain (to be hereafter considered) can be held to apply to them. There is no such restriction with regard to moveable property.

Again, the introduction of the prohibitions with respect to immoveable property leads to the implication that no other restrictions relating to gifts to corporations, or for the purpose of founding them, beyond those expressly mentioned, were intended to be imposed or retained.

It is impossible to suppose that if the provision of the edict in question was really in force at the time of the Code, and it was intended to preserve it, that the Code in dealing, as it does fully, with testamentary dispositions, and in a series of articles under a distinct head with "the capacity to receive and give by will" (see title 2, ch. 3, s. 1), should have omitted all mention of it. Their Lordships, therefore, think they cannot treat the second article of the edict as a part of the existing law of the province relating to wills, and if this be so, there is nothing in that law, so far as the objection now under consideration

is concerned, to affect the validity of the bequest of the moveable property.

But it is contended, secondly, that as regards the immoveable property the devise falls within the direct prohibition contained in Arts. 366 and 836 of the Code. Art. 366 is limited by its terms to the acquisition of immoveable property only; and Art. 836 must be limited by construction to such property. It is to be observed that Art. 836 appears to be founded on ch. 34, sect. 3, of the Consolidated Statutes of Lower Canada, which section embodied the provision of 41 Geo. 3, ch. 4, s. 1.

Both articles relate to gifts to corporations already formed. And the question is, whether a devise like the present, by which the property is given to fiduciaries, and is to pass from them to a corporation only in the event of its being lawfully created with permission to possess it, is within their scope. The devise in this case is to trustees for the primary purpose of establishing an institute, and for effecting that purpose they are to obtain a charter or act of incorporation.

It is said that this is, in effect, devising indirectly lands to a corporation, having no licence from the Crown or other legal power to hold them. But is this really the case? The devise is, in the first instance, to the trustees, and under it they are empowered, at least for a time, to hold and administer the property for the purpose of the trust, and until, in further execution of the trust, a corporation is created with authority to administer it. If a corporation with power to hold the property should be granted, the acquisition of it by such corporation would, before it vested, be sanctioned by law: whilst if it were not created, there could be no infraction of the law against holding in mortmain.

Apart, therefore, from the second article of the edict, there would seem to be nothing in principle or in positive law to render such a gift as the present illegal as a gift in mortmain. The direction to the trustees to procure a charter or act to incorporate a body empowered to hold the property and carry into effect the objects of the gift, necessarily implies a condition to be fulfilled previously to the vesting of the property; and the permission of the Crown to hold the lands would of necessity precede their acquisition by the Corporation, and render it lawful.

Commentators of high authority on French law have treated such dispositions, apart from the Edict, as clearly good, and numerous passages from their treatises to this effect are collected in the judgment of Mr. Justice Badgley. It is sufficient to cite one. Ricard, "Traité des Donations," No. 113, says:—

"Lorsque les donations et legs sont faits pour l'établissement d'un monastère, on ne pourrait pas opposer le défaut des lettres patentes; ce qui est juste, parce que ces sortes de dispositions sont présumées faites sous condition, et pour avoir lieu, au cas qu'il plaise au Roi d'agréer l'établissement."

Abbott & Fraser.

The same doctrine was sanctioned, and the grounds on which it rests were fully expounded by Lord Eldon in the case of Downing College, which in its circumstances bore some analogy to the present: *Attorney-General* v. *Bowyer*. (1)

What the position of the trustees would be in case they failed to obtain a charter or act of incorporation, was the subject of some discussion at the Bar. If consistently with the intention of the testator they could carry into effect the purpose of the devise, and establish and perpetuate the institute by means of a perpetual succession of trustees, which their Lordships are not satisfied could be done by the law of Canada, it might be a question whether in such case the trustees would not be "*gens de main-morte*," and the devise, therefore, of the immoveable property *ab initio* void by virtue of Art. 836 of the Code. In that case Art. 869 might not avail to protect the devise. It is true that by this article a testator is empowered to appoint fiduciary legatees for charitable or other lawful purposes, but only "within the limits permitted by law." Now the Code undoubtedly prohibits the devise of immoveables in mortmain, and if the will had created trustees with power of perpetual succession, it might, as already observed, have been questionable whether the devise of the lands to such trustees would not have infringed this prohibition, and be, therefore, beyond the limits permitted by law.

But their Lordships think that this is not the character of the devise. It appears to them that the devise to the trustees was meant to be limited and transitory, the property remaining in them only until they could execute the ultimate purpose of the devise. It is true the primary trust is to establish the institute, but it is a cardinal part of the trust that, "for that purpose," the trustees are to procure a charter or act of incorporation, and as soon as it shall have been obtained, they are directed to convey the property to the corporation. There is no direction to convey to new trustees. The trustees are, indeed, empowered to sell such of the property as they deem expedient, to acquire property and to construct buildings, and to proceed to carry out the testator's designs, but only "up to such time as the property hereby devised to them shall be conveyed over to the Fraser Institute."

Art. 964 of the Code provides for the case of a "Legatee who is charged as a mere trustee to administer the property and to employ it or give it over in accordance with the will, in the event of the impossibility of applying such property to the purpose intended;" and directs that, in such a case the property, unless the testator has manifested an intention that shall it be retained by the trustee, shall pass to the heir. Their Lordships consider that an impossibility to apply the property in accordance with the will would in this case arise, if the trustees failed,

(1) 3 Ves. 724.

after the lapse of a reasonable time, to obtain a charter or act of incorporation, and that in that event the property would pass to the heirs under the above article.

It was suggested that new trustees might be appointed in succession so long as the execution of the will should last under Art. 923 of the Code, which is as follows :—

" The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace them himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law."

But it was not in this manner the testator designed that the purpose of his will should be permanently carried into evecution. It is true that he directs that three persons to be named by his trustees should compose with them the first board of governors of the institute, which he desired should always be composed of five persons, and of which Mr. Abbott was to be president for life, with power to them to supply any vacancy caused by death or resignation ; but this is the scheme he provides for the governing body of the intended corporation, as is shewn by the direction which immediately follows it, viz, " that so soon as the requisite charter shall have been obtained containing all the powers necessary to carry out my designs herein contained," the property should be conveyed to the corporation. Their Lordships having regard to the scheme of the will, cannot think it was the intention of the testator to create, or attempt to create, a board of governors in perpetuity without the authority of a charter or statute, and so endanger his devise, at least as regards the immoveables, as being an unauthorized gift in mortmain.

The third and remaining objection is that the gift failed, being a gift to a society not in existence at the testator's death.

If the devise had been to a society or a corporation to be afterwards called into existence or created without the interposition of fiduciary legatees or trustees, this objection might have given occasion to difficulties of great weight.

It was said by the Court of first instance in Des Rivières v. Richardson (1) :—

" It may be admitted that, if by a will an immediate devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special and express law to take the case out of the general principle.

But it was also said in the same case in the Court of Appeal :—

(1) Stuart's Rep. 218.

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"The second ground of objection is also untenable, for although it is admitted that a legacy is lapsed (*i. e.*, '*caduque*') when left to an individual, or to a body politic and corporate, not *in esse*; yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the Royal Institution, as soon as it should please the Provincial Government to give to airy nothing, "a local habitation and a name."

That case no doubt differed in some of its facts from the present, as the Royal Institution had been, in some sense, incorporated before the date of the will; but the principle is asserted in it that the intervention of trustees will, in some cases at least, prevent a lapse.

Their Lordships on this point, having regard to Art. 869, which permits the appointment of fiduciary legatees for charitable and other lawful purposes, and to Art. 838, which, in the case of legacies suspended after the testator's death in consequence of a condition or substitution, declares that the capacity to receive is to be considered relatively to the time when the right comes into effect, are of opinion that there has been no lapse in this case, and that the trustees may carry the purpose of the testator into effect if and when the corporation of the Fraser Institute is duly incorporated. The transfer of the property to the corporation is directed to be made by conveyance from the trustees who, in then making it, will execute the lawful purpose for which the property was entrusted to them.

It is evident that the charitable and lawful purposes mentioned in Art. 869 were not meant to be confined to such trusts only as may be created for the benefit of same definite persons. The use of the word "purposes" indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequests be within the limits permitted by law.

Their Lordships, for the reasons given, think that the devise in question complies with these conditions and ought to be sustained; and they will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, and direct that the suit be dismissed. But, considering that the law of Canada on the questions arising upon this will was in an unsettled state, their Lordships think that the heirs of the testator might reasonably dispute its validity, and that the parties, therefore, should pay their own costs of the litigation below and of this appeal.

Wilde, Berger, Moore & Wilde, solicitors for the appellants.
Bishop, Bompas, & Bischoff, solicitors for the respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1878.

5th July, 1878.

Coram SIR JAMES COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, THE MASTER OF THE ROLLS.

ANGERS *v.* THE QUEEN INSURANCE COMPANY.

In this case their Lordships do not intend to call upon the counsel for the respondents.

This is an appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court of the District of Montreal. The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of Quebec, 39th of the Queen, Chap. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals, were not authorized by the Union Act of Canada, Nova Scotia and New Brunswick; which entrusted the Province, or the Legislature of that Province, with certain powers conferred by the 92nd section of the Act in question are sufficient to authorise the statute which is under consideration?

It is not absolutely necessary to decide in this case how far, if at all the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider, namely, the subsections 2 and 9 of the 92nd section, those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is: whether what has been done is authorised by those powers?

The first power to be considered, though not the first in order in the Act of Parliament, is the 9th sub-section. The Legislature of the Province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other "licenses, in order to the raising of a revenue for "provincial, local, or municipal purposes." The statute in question purports to be, on the face of it, an exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license, before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the second section, enacts what the price of the license is to be. And reading it shortly, it amounts to this: that the price of the license shall consist of a stamp affixed to the policy or receipt or renewal as the case may be. The adhesive stamp is to be, in the case of fire, 3 per cent., and 1 per cent. for other assurances on the premiums paid. Then the fourth section enacts that anybody who, on behalf of an assurer, shall deliver any policy or renewal or receipt

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without the stamp shall be liable for each contravention to a penalty of fifty dollars. The fifth section says that every assurer bound to take out a license shall be liable in each case to a penalty not exceeding fifty dollars if it has been delivered without an adhesive stamp. The sixth section says that every person who affixes the stamp shall be bound to cancel it so as to obliterate it, and prevent its being used again. And the seventh makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be "invoked, and shall have no effect in law or in equity before the Courts "of this Province." Then there are certain sections of the Quebec License Act which are incorporated, and the Act is not to apply to assurances not within the Province. The only provision of the Quebec License Act which it is necessary to refer to is the 124th: "For every license issued "by a revenue officer, there shall be paid to such revenue officer, "over and above the duty payable therefor, a fee of one dollar by the "person to whom it is issued."

Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not not compelled to take out the license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this: that if you leave out the clauses about the license' the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the Government of the Province of Quebec obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt or renewal; it is not a penalty for not taking out the license. The result, therefore, is this, that it is not in substance a license Act at all. It is nothing more or less than a simple Stamp Act

on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorize a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the appellants, that though at first sight it might appear that this was not a license, and that this was not the price paid for a license, yet it could be shown by the existing legislation in England and America that licenses were constantly granted on similar terms; and that therefore in construing the Dominion Act we ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found that they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it, was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of trade he did. This is not a payment depending in that sense on the amount of trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out and is not really a price paid for a license, but as has been said before, a mere stamp on the policy, renewal or receipt.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd sub-section of the 92nd section. That authorizes "direct taxation within the Province in order to the raising of a revenue for provincial purposes." The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals and receipts, with provision for avoiding the policy, renewal or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and, in trying to find out their meaning, we must have recourse to the usual sources of information whether regarded as technical words, words of art, or words used in popular language. And that has been the course

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pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau. in his elaborate judgment, it is not necessary here to more than refer to. But surely if one could have been found in favor of the appellants, it was the duty of the appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think that they are warranted in assuming that no such case exists. As regards judicial interpretation there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant.

Lastly, as regards the popular use of the words, two cyclopædias at least have been produced, showing that the popular use of the word is entirely the same in this respect as the technical use of the word. And, here again, there is an utter deficiency on the part of the appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is, that finding these words in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation. they must consider it was not the intention of the legislature of England to include it in the term of direct taxation, and therefore that the imposition of the stamp duty is not warranted by the terms of the 2nd sub-section of section 92 of the Dominion Act. That being so, it appears to their Lordships that the appeal fails. and they will, therefore. humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

Appeal dismissed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Attorney-General & Reed.

London, Nov. 26, 1884.

Before THE LORD CHANCELLOR, LORD FITZGERALD, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

THE ATTORNEY-GENERAL FOR QUEBEC, *v.* REED.

The LORD CHANCELLOR delivered judgment as follows:—

Their Lordships have considered the argument which they have heard, and they have come to the conclusion that the judgment appealed from must be affirmed.

The points to be considered are three: first of all, can this charge upon exhibits used in the courts of justice of the province be justified under the 2nd sub-section of clause 92 of the British North America Act? Is it a case of direct taxation within the province "in order to the "raising of a revenue for provincial purposes?" What is the meaning of the words "direct taxation."

Now it seams to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the appellant's argument than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is — in the words which are printed here from Mr. Mill's book on political economy—"one which is "demanded from the very persons who it is intended or desired should "pay it." Ank then the converse definition of indirect taxes is, "those "which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Well now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant, expecting or

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hoping for success in the suit; and whether he or his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The Legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment it was exigible, or upon anyone else. Therefore it cannot be a tax demanded "from the "very persons who it is intended or desired should pay it;" for in truth that is a matter of absolute indifference to the intention of the Legislature. And on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd sub-section of the 92nd clause of the Act in question. Still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

That point, which is the main point, and was felt to be so by Mr. Davey in his very able and clear argument, being disposed of, the next question, upon the terms of the same section of the same Act, is that which arises under sub-section 14. One of the things which are to be within the powers of the Provincial Legislatures—within their exclusive powers—is the administration of justice in the province, including the constitution, maintenance, and organization of Provincial Courts, and including the procedure in civil matters in the Courts. Now it is not necessary for their Lordships to determine, whether, if a special fund had been created by a Provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the Province; it does not provide in any way, directly or indirectly, for the maintenance of the Provincial Courts; it does not pur-

port to be made under that power, or for the performance of that duty. The subject of taxation indeed is a matter of procedure in the Provincial Courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the second sub-section; it is made part of the general consolidated revenue of the province. It therefore is precisely within the words "taxation in order to the raising of a revenue for provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice that any other part of the general provincial revenue. Attorney-General & Reed.

Their Lordships, therefore, think that it cannot be justified under the 14th sub-section.

With regard to the third argument, which was founded on the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the preexisting powers of the Governors or Lieutenant-Governors in Council to do certain things, not there specified. That, however, was subject to a power of abolition or alteration by the respective Legislatures of Ontario and Quebec, with the exception, of course, of what depended on Imperial Legislation. Whatever powers of that kind existed the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that, among those powers, there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the Courts, not for the general revenue purposes of the province, but for the purpose of forming a special fund called "the Building and Jury Fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the Building and Jury Fund. It is a Legislative Act without any reference whatever to those powers, if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax, for the general purposes of the province, and in aid of the general revenue, these legal proceedings.

It appears to their Lordships that, unless it can be justified under the 92nd section of the British North America Act, it cannot be justified under the 65th.

Their Lordships must, therefore humbly advise Her Majesty to dismiss this appeal.

Bourgouin & Ross.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

14me Février, 1880.

Coram SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

BOURGOIN ET AL., *v.* LA COMPAGNIE DU CHEMIN DE FER DE MONTRÉAL, OTTAWA ET OCCIDENTAL, ET ROSS.

The only question which has been fully argued upon the four appeals consolidated in this record is whether the judgment of the Court of Queen's Bench rendered in the first suit, No. 693, was right in annulling and setting aside the award of the 28th of July, 1876, upon either of the grounds stated in it. As to one of those grounds which proceeds upon the assumption that the lump sum of $35,013, awarded to the appellants, included the whole value of the land, and not merely the value of their interest as lessees, it is not necessary to say anything, because that objection has not been pressed.

The question, therefore, is reduced to this: can the judgment be supported on the other ground taken? Their Lordships confined the argument, in the first instance, to that question, because they thought that if the award was found to be invalid on the face of it, that finding would go far to dispose of all or most of the questions which have been litigated between the parties. They will, therefore, for the present. confine their attention to the first of the suits and the final judgment therein, nor will they go into the facts further than is required in order to elucidate the single point to be now determined. The appellants are four persons holding a quarry, as lessees, under a Mrs. Smith. They are sometimes described as working together in two partnerships of two each, as " Bourgoin et Fils " and " Bourgoin et La Montagne," but for all practical purposes they may be treated as the four joint lessees of the quarry. The respondents, who were the plaintiffs in the suit, are a Railway Company, styled on the record " The Montreal, Ottawa, and Western Railway Company." The Company was incorporated originally under another title, viz., " The Montreal Northern Colonization Railway Company," by an Act of the Legislature of the Province of Quebec)32 Vict., c. 55). and was governed by that and a subsequent statute of the same Legislature, 34 Vict., c. 23. It was, therefore, in its inception a provincial railway. In 1873. however, the Parliament of Canada, by Act 36 Vict., c. 82, declared this railway to be a Federal enterprise, and by a subsequent statute (38 Vict., c. 68) changed the name of the Company to that which it bears on this record. Hence, when the proceedings which resulted in the award in question were commenced, the railway had become a Federal railway, and the respondent company was subject to and governed by the provisions of the Canadian statute known as " The Railway Act, 1868."

It appears that, in one or other of the above two states of existence, this company had proceeded in the usual way to ascertain the compensation payable to the lessor, Mrs. Smith, in respect of her freehold interest in the land to be expropriated. The appellants intervened, and sought to have the sum payable to them for compensation in respect of their interest as lessees ascertained by the same proceeding. The Company declined to accede to this, and having settled the amount of compensation payable to Mrs. Smith, took possession of the quarry. The appellants upon that instituted certain proceedings, in order to compel the Company to ascertain the compensation due to them: those proceedings were ultimately successful, and thereupon the Company gave the notice of the 22nd of February, 1875, which was the foundation of the proceedings that resulted in the award. Their Lordships think it right here to observe that, in their opinion, there is nothing exceptional in that notice, nothing which supports the suggestion that its terms were varied by reason of the Company having previously, and perhaps wrongfully, taken possession of the quarry. It appears to them to be the usual notice contemplated by "the Railway Act of 1868." The words which have been so much relied on as authorizing the arbitrators to settle all questions between the parties have been taken *verbatim et literatim* from the 10th sub-section of the 9th section of that Statute. After the service of the notice, arbitrators were appointed and the award in question was made, and the only two documents besides the notice which seem to be in any way material for the decision of the question now to be determined are, the award itself, which is at page 12, and the claim of the appellants, which is at page 20 of the record.

The material passage in the award, upon which the whole question turns, is that whereby the arbitrators, after stating that they had proceeded to assess the compensation to be paid by the Company to the appellants for the piece of land described, and for all the damages resulting from the taking possession of the same, and had visited the said piece of land, and estimated with care and established the value of it, and the amount of the said damages, proceeded to award.—.

"The sum of $35,013, *plus* $100 per month from this date, payable on the first of each month, until the said Company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land, and constructed a culvert to protect the said watercourse, as being the amount of compensation to be paid by the said Montreal Northern Colonization Railway Company, now called 'the Montreal, Ottawa, and Western Railway Company,' to the said 'Bourgoin et Fils' and Bourgoin and La Montagne for the said piece of land, and for all the damages resulting from the possession of the same."

The objection taken to the award is now confined to that portion of the passage just quoted, which includes and follows the word "plus," and relates to what the arbitrators seem to have considered as wholly

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or in part the compensation due to the appellants in respect of that portion of their claim which was comprehended in the words of its 4th head, and claimed damages for the watercourse diverted by the Company, and for pumping and work to be done at the rate of $600 per annum for eight years (which they treated as the probable duration of their lease), and amounting to a gross sum of $4,800. Their Lordships, after full consideration of this case, and of the learned arguments upon it, have come to the conclusion that, in respect of the passage in question, the award is bad upon the face of it. The case of the appellants was very ingeniously put, particularly by Mr. Fullarton. His argument was to this effect. He said that the arbitrators probably conceived that, if they gave that full sum claimed on the assumption that the interruption of the drainage would last for the whole duration of lease, fixed at eight years, they might be doing great injustice to the Company; that by virtue of the 6th sub-section of the 7th section of "the Railway Act, 1868," which is in these words:—

"To construct, maintain, and work the railway across, along, or upon any stream of water, watercourse, canal, highway, or railway which it intersects or touches; but the stream, watercourse, highway, canal, or railway so intersected or touched shall be restored by the Company to its former state, or to such a state as not to impair its usefulness."

The Company was, to the knowledge of the arbitrators, under a statutory obligation to restore the watercourse; that they assumed that the Company would perform that statutory obligation as soon as possible; and accordingly assessed the damages in the manner complained of in case and for the supposed benefit of the Company; and further, that it was competent to them so to do.

The motives of the arbitrators, whatever they may have been, cannot validate their act if that were *ultra vires*. And the first observation which their Lordships have to make is that, as they read the statute, it was not competent to the arbitrators to impose the payment of a rent or periodical sum at all. The word "rent," no doubt, occurs in several of the sub-sections of section 9; but their Lordships think that the use of that word is always to be explained by reference to the provisions contained in the sub-sections 3, 4, and 8, and that in every case, except those in which the parties expropriated fall within the description of "corporations or persons who cannot in common course of law sell or alienate the lands set out and ascertained," it is the duty of the arbitrators to fix as compensation, such a gross sum or sums as would be capable of being paid or tendered at once to the parties entitled to the same under the 27th sub-section, or into Court under the 34th sub-section, of the 9th section of the Act, in order to entitle the Company to possession under the 27th, or to a confirmation of title under the 34th and 35th sub-sections. It appears, moreover, to their lordships, that even if a rentcharge could be given by way of compensation in circumstances

like these to the expropriated parties, it has not been done in this case; that the monthly sum awarded is not in any sense of the term, a rent; that it is more in the nature of an assessment of damages payable *in futuro*, and does not in any point of view fall within the provisions of the Act.

A further objection to this part of the award is, that it makes the monthly payment contingent on the completion and erection of certain works, and thus introduces an element of uncertainty which would of itself be a fatal objection to the award. That it is open to the objection of uncertainty is shown by the observations which have been quoted from the judgment of Mr. Justice Tessier, who decided in favour of the appellants. The learned Judge, p. 403, line 20, assumes that if the culvert is not constructed the annual sum will continue to be payable, not only to the appellants and their assigns, but to the reversioner, Mrs. Smith. The learned Counsel for the appellants repudiated that construction; but the fact that it was put by the learned Judge upon the document goes to prove that there is some degree of uncertainty in the award. Again, the duration of the appellant's interest is uncertain, in that they held their lease with the power of renewing it so long as any stone remained to be worked, They might thus prolong the time during which the monthly sum would be payable, by omitting to work the stone, although no doubt the Company would have the power to put an end to their liability by doing the works prescribed.

Lastly, there seems to their lordships to be a fatal objection to the award in the direction to the Company to restore the water course in a particular manner, and that by the construction of a culvert. They conceive that it was not within the functions of the arbitrators to prescribe how the company was to relieve itself from the statutory obligation imposed upon it by the 6th sub-section of the 7th section, or to cast upon them the construction of a culvert which possibly might not not be necessary.

It is right now to notice shortly certain authorities which have been invoked in the course of the arguments at the bar. The Chief Justice referred to four cases reported in the 12th Queen's Bench reports, Upper Canada, as supporting his judgment, whereas the learned counsel for the appellants has treated them as authorities in his favour. If those decisions are opposed to the decision of the Court of Queen's Bench of Quebec in this case, that would only show that there is a conflict of authority between the highest courts of the two provinces, and that it is for their lordships to decide between them. But their lordships think that in truth there is no conflict at all, and that the cases in question do go to support the judgment of the Chief Justice in this case. It is to be observed that in all four cases the award was set aside. There is, therefore, no affirmative decision that a clause of this kind in award is good. The only pasage in the judgments in question which seems to their lord-

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ships capable of being treated as in favour of the appellants is that at page 114 of the volume, in the case of the *Great Western Company vs. Baby*, Chief Justice Robinson there says :—

" The second and third objections seem also to have been satisfactorily answered. It is not the devisees who are moving against the award, on the ground that some things are directed in their favour which cannot be enforced against the Company ; it is the Company who are complaining of the extravagance of the award. If they choose to object against the making and maintaining the tank spoken of, and to keeping open the Ferry street, and can successfully resist both or either of them, that would only show that, so far as the amount of the award can have been influenced by assuming that those things were to be done, the devisees may have reason to complain that they have been deluded by promises of advantages which cannot be secured to them, and that the sum awarded as the value of their property should therefore have been larger, as the cannot reckon upon enjoying these benefits, which the arbitrators may have taken into account as considerations in their favour, tending to diminish the sum to be awarded."

He goes on to say,—

" Besides, these are not things which the arbitrators have taken upon themselves to direct. They seem rather to have inserted them as being things understood between the parties, and which they had therefore taken into consideration in estimating the damages."

Then, at page 121, after saying that the award must be annulled upon another ground, he says,—

" But, to avoid occasion for question upon any future award, we would suggest that it should be clearly expressed, in the first place that the sum awarded is given for the value of the lands and tenements or private privileges proposed to be purchased, or for the amount of damages which the claimant is entitled to receive in consequence of the intended railroad in and upon his lands (as the case may be), and that the award should either be silent in regard to any other matter on which the statute gives no authority to the arbitrators to give a direction, or that, if the estimate has been influenced by anything which the Company has engaged to do in order to lessen the inconvenience, it should be plainly expressed that the Company have undertaken to do it, and the particular thing should be so defined as to leave no uncertainty, and no room for future litigation as to what is to be done or allowed by the Company, and at what particular part in their work and in what manner it is to be done."

Therefore this judgment proceeded upon the fact that the Company had agreed and offered to do certain things, not that the arbitrators had imposed upon this Company the obligation to do them, and it points out that the award would be more correctly drawn if it had taken no notice at all of the works in question, or had stated that the Company

had voluntarily undertaken to perform them. It gives no countenance to the doctrine that it is competent to arbitrators to impose such an obligation as of their own authority.

Again, the case cited from Sirey's collection seems to be distinguishable from the present in the manner in which Chief Justice Dorion has pointed out. There a gross sum was awarded, but that gross sum was made reducible if the Company should do something which, as in that Canadian case, they had undertaken to do. The case is certainly distinguishable from the present, both because the compensation awarded was one sum payable at once, and because the Company had undertaken to do the works in question. Several other French decisions have been cited by Mr. Justice Tessier in support of his view of this award, but it appears to their lordships impossible to reconcile the broad principle which he seems to deduce from them, viz., that objections of this kind can only be taken by the person expropriated, and not by the body that expropriates, with the Railway Act of 1868 and its provisions. Their lordships think that this case ought to be decided upon Canadian legislation and upon Canadian jurisprudence. For that reason they do not notice the case from the Isle of Man, which was cited by Mr. Benjamin.

The only remaining question to be considered is one which was suggested in the course of the argument, viz., whether the objectionable part of the award is severable from that which awards to the appellant the sum of $35,013, so that the appellant may recover that, waiving their right to the rest of the compensation awarded. The point was never taken in the Canadian Courts, no offer of waiver was made there, and it may be questionable whether that point can now, for the first time, be raised here. Assuming, however, that it is open to the appellants, their lordships are of opinion that the award is not severable in the manner suggested, the compensation improperly awarded being combined as it is with that which was properly awarded, and both declared to be "le montant de la compensation à être payée, pour le dit morceau "de terre, et pour tous les dommages résultant de la possession d'ice-"lui." And if they were severed a question might arise, as Mr. Benjamin has argued, whether the award would not be defective in that it failed to deal fully with one of the questions submitted to the arbitrators, viz., the amount of compensation due to the appellants under the fourth head of their claim.

This being their lordships' view, they think that the decision of the Court of Queen's Bench, which annulled and set aside the award as invalid on the face of it, is correct. They have come to that conclusion with considerable regret, because they feel that the appellants were entitled to a fair compensation for the expropriation of their quarry, and that now, after a vast amount of expensive litigation, they are as far as ever from receiving that compensation. Their lordships do not say that

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the fault is wholly that of the Company or wholly that of the appellants; but the lamentable result remains, and they can only express their hope that in some way or another means will be found to give the appellants a fair compensation for the expropriation of their quarry, and for the damages which they have sustained thereby. Their lordships, however, can but decide this question on its legal merits, and they feel that it is of great importance that arbitrators, with the large power given to them by "The Railway Act, 1868," should be kept within the limits of their authority.

The conclusion to which their lordships have come seems to dispose, not only of the first appeal, but of most of the other questions raised on the record.

The judgment of their Lordships, which was delivered on the 14th instant, and ruled that the award of the 28th of July, 1876, was bad on the face of it, disposed, except as to costs, of the appeals numbered 13 and 144 respectively, and of all the questions on this record between the appellants and the respondent Company.

It seemed, moreover, to leave to the appellants no substantial interest, other than costs, in the rest of the litigation. Their Counsel, however, expressed a desire to argue the remaining appeals (Nos. 117 and 141), and satisfied their Lordships that they were entitled to do so. Those appeals have accordingly been heard, and their Lordships have now to give judgment upon them. In order to see clearly what are the questions raised by them, it is necessary to refer shortly to some of the proceedings in the two actions numbered respectively in the Superior Court 693 and 1,213.

In the latter of these, which was brought by the appellants against the Company in December, 1874, in order to recover the amount due on the award, the respondent, the Attorney General, intervened in the month of February, 1878. The cause was heard on the 18th of April, 1878, by Mr. Justice Mackay in the Superior Court against both the Company, the defendants, and the Attorney General as intervenor, and the Judgment of that Court dismissed the intervention, and condemned the Company to pay to the appellants the amount due on the award. From this judgment the Company and the Attorney General appealed separately. The Court of Queen's Bench reversed the judgment of the Superior Court against the Company, and the appeal of the appellants against so much of their judgment (No. 144) has already been disposed of. The appeal of the Attorney General was also allowed, and the judgment of the Superior Court reversed as against him, but on the ground that the intervention, though legally competent, was unnecessary, without costs. Hence the appeal No. 117.

Again, the Superior Court, by its judgment in Suit No. 693, wherein the Company sued to set aside the award, dismissed that suit with costs. The Company appealed against that judgment, and has succeeded both.

in the Court of Queen's Bench and here in getting it reversed. The date, however, of the judgment of the Superior Court was the 30th of April, 1877; the appeal against it was not lodged until the 5th of October following, and intermediately, *i. e.*, on the 22nd May in that year, the appellants issued a writ of execution for their costs, under which the sheriff seized certain lands, rolling stock, and other property as belonging to the Company. On the 17th January, 1878, the Attorney General filed "an opposition à fin de distraire," by which he claimed the whole of the property seized as the property of the Queen for the use of the Province of Quebec. The appellants filed their contestation, and on the 31st May, 1878, Mr. Justice Johnson pronounced the judgment of the Superior Court, which upheld the opposition; declared that all the lands seized were the property of Her Majesty for the use of the Province of Quebec; that accordingly the seizure of the lands, immoveables and acce-sories in question was null, void, and illegal, and granted main levée thereof to the opposant, with cost against the contestants, the present appellants. That judgment was, on appeal, confirmed by the Court of Queen's Bench, and hence the appeal No. 141. Bourgouin & Ross.

The determination of both these appeals mainly depend on the effect to be given to the transaction between the Company and the Government of Quebec which is embodied in the Notarial Act or Deed of the 16th of November, 1875, and in Act 39 Vict., c. 2 of the Legislature of Quebec. The parties to the Deed are stated to be Her Majesty the Queen, represented by the Secretary of the Province of Quebec, "acting as well for and on behalf of Her Majesty as for and on behalf "of the Province of Quebec, party hereto of the first part, hereinafter "called 'the Government,' and the Montreal, Ottawa, and Western "Railway Company, described as a body politic and corporate, duly "incorporated by statutes of the Province of Quebec and of the Domi-"nion of Canada, &c., party hereto of the second part, hereinafter called "'the Company.'" The deed, after reciting the nature of the enterprise and the commencement of the work, and that the Company was then unable to proceed further with the construction of the railway by reason of certain bonds not being negotiated; and that the Government was willing to assume and complete the construction of the said railway upon such terms and conditions, and in such manner and within such time as the Government might deem expedient, and for that purpose to acquire from the said Company all its rights and assets, and to take upon itself the legitimate liabilities of the Company, and to repay the disbursements of the Company in manner and form and to the extent thereinafter described; and that in consideration thereof the Company had agreed to transfer and convey such rights and assets to the Government also upon the conditions thereinafter expressed—proceed to state, in different clauses, the covenants and agreements into which the parties had entered before the notary. The material clauses are the 1st, 2nd, 4th, 7th, 8th, and 9th.

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By the 1st, the Company granted, sold, and conveyed to the Government all its right, title, and interest in the uncompleted railway, with all lands acquired or bonded for right of way, stations, and other purposes, all bridges, piers, abutments, forms, and other things expressly mentioned, stating their intention to be "to divest the Company of all "the property of the said corporation, and of all and every part and "parcel of the said incomplete railway, and of everything appertaining "thereto or necessary or useful or acquired for the construction thereof, "now in the possession of the Company, or to which it is entitled, as "fully and completely to all intents and purposes as the same are now "held by the Company, and to vest the same in the Government."

By the 2nd, the Company transferred to the Government all its right, title, and interest in and to the balance of the subscription of stock in the said Company by the Corporation of the city of Montreal, and the several subscriptions of stock in the said Company of various other corporations, together with all the rights, claims, and demands of the said Company upon the said city of Montreal for the said balance of subscriptions, and upon the said other corporations for their said subscriptions of stock and bonus.

By the 4th, the Government, in consideration of the above sales and transfers, agreed to pay to certain trustees for the Company, upon the confirmation of the deed, the sum of $57,149.95 currency, being the amount of the then paid up capital of the Company; and also to pay immediately all such disbursements and liabilities as had been adjusted between the Government and the Company; and it was further agreed that if any further legitimate liabilities should be established to the satisfaction of the Government to be justly and legally due by the Company, the same should also be assumed and paid by the Government.

By the 7th, it was provided that, until it should please the Government to receive possession of the property and premises thereby transferred, the Company should hold and administer the same for and on behalf of the Government, and in such manner as should be directed by it, and should, in all respects, carry out the instructions of the Government in respect of the said railway: and in respect of every matter and thing connected therewith, until the transfer and delivery thereof to the Government and its complete assumption and possession thereof had been perfected; and that, so soon as such transfer and delivery should have been so perfected, the Company should dissolve itself, and should cease to act in any way, the Government thereupon indicating some person to accept transfers of the shares of the Company held by the individual shareholders therein.

By the 8th, the Company undertook to assist the Government, in any manner that might be required, in procuring the passage of any Act by the Dominion or the Provincial Parliament that the Government might deem expedient to have passed in the interest of the enterprise, and to furnish aid and assistance in other matters.

And, by the 9th, it was provided that the deed should have no force or effect after the termination of the next Session of the Legislature of the Province of Quebec, unless confirmed by the said Legislature at the next Session thereof, nor until such confirmation; but that it should be submitted for such confirmation to the next Session of the said Legislature, and, immediately upon such confirmation, should have full force and effect according to its terms.

The confirmation required by this last clause of the deed was given by the Act 39 Vict., c. 2, which was passed by the Legislature of Quebec on the 24th December, 1875. That Statute not only, by its 8th Section, confirmed in the fullest manner the transfer and assignment of the 2nd November, 1875, it did a great deal more: it combined the enterprise of the Montreal, Ottawa, and Western Railway Company with that of another Company called the North Shore Railway Company, which had made a similar transfer in favour of the Government of Quebec; it gave to the railway to be completed the new name of "The Quebec, Montreal and Occidental Railway"; it declared that railway to be a public work belonging to the province of Quebec, held to and for the public uses of the province, and provided for the mode of its construction; it vested the construction and management of that railway in certain Commissioners with ample and defined powers; by Section 11 it made the provisions of the Quebec Railway Act, 1869, so far as they were applicable to the undertaking and not inconsistent with the provisions of that Act, applicable to the said railway, and empowered the Commissioners, in cases where proceedings had been commenced by the Montreal, Ottawa and Western Railway for the expropriation and acquisition of lands for the purposes of that railway and had not been completed, to continue such proceedings under the provisions of the Quebec Railway Act, but with the consent of the proprietor of such lands, or to discontinue such proceedings, and commence proceedings *de novo* under the said Quebec Railway Act, and by Section 24 it reunited lands which had been granted to the Montreal, Ottawa, and Western Railway Company, to the public lands of the province. Sections 43, 44, 45, and 46 have even a more direct bearing upon the questions raised by the two appeals now under consideration. Section 43, in order "to avoid all doubts," enacts that the Quebec, Montreal, and Occidental Railway is thereby invested with all the rights, powers, immunities, franchises, privileges, or assets granted by the Legislature of the Province of Quebec to the Montreal Northern Colonization Railway Company, and, so far as that Legislature could do, with all the rights, powers, immunities, franchises, privileges, and assets granted by the Parliament of the Dominion of Canada to the Montreal, Ottawa, and Western Railway Company. Section 44 takes away the power of the last mentioned Company to appoint Directors, and abolished the Directorate contemplated by the former Statutes. Section 45 transfers to the Commissioners the rights

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of the individual shareholders in the Montreal, Ottawa, and Western Railway Company, providing that their paid-up stock shall be refunded to them; and Section 46 authorizes the Commissioners, with the consent of the Lieutenant Governor in Council to apply to the Parliament of Canada for any legislation which may be deemed necessary for the purpose of the Act.

The combined effect, therefore, of the deed and of this Statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing Company, to the Quebec Government, and, through it, to a Company with a new title and a different organization; to dissolve the old federal Company, and to substitute for it one which was to be governed by, and subject to, provincial legislation.

It is contended on the part of the appellants that this transaction was invalid, and altogether inoperative to affect the obligations of the Company. They insist that, by the general law and by reason of the special legislation which governed it, the Company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent Legislature; and, further, that the Legislature of Quebec was incompetent to give such sanction. This contention appears to their Lordships to be well founded.

That such a transfer, except under the authority of an Act of Parliament, would in this country be held to be *ultra vires* of a Railway Company, appears from the judgment of Lord Cairns *in re* Gardner r. London, Dover, and Chatham Railway Company, 2 Chancery Appeals. 201 and 212. That it is equally repugnant to the law of the Province of Quebec, so far as that is to be gathered from the Civil Code, is shown by the 369th Article of that Code. But the strongest ground in favour of the appellants' contention is to be found in the special legislation touching this Railway Company. The history of the Company and of its conversion from a provincial into a federal Railway Company has been stated in the judgment already delivered. By Section 1 of the Canadian Statute 36 Vict., c. 82, which effected that conversion, the railway was declared be a work for the general advantage of Canada. By the 5th Section of the same Statute, it was enacted that the continuations of the line thereby authorized should be deemed to be railways or a railway to be constructed under the authority of a special Act passed by the Parliament of Canada, and that the Company should be deemed to be a Company incorporated for the construction and working of such railways and railway, according to the true intent and meaning of "The Railway Act, 1868" the Dominion Statute. By the 6th Section, Parts 1st and 2nd of "The Railway Act, 1868" which comprise all the general and material provisions of that Statute), were made applicable to the whole

line of the railway, whether within or beyond the enterprise originally contemplated; and it was enacted that no part of "The Quebec Railway Act, 1869," should apply to the said railway, or any part thereof, or to the said Company. And by the 7th Section it was provided that the two Acts of the Quebec Legislature (32 Vict., c. 35, and 34 Vict., c. 28), by which the Company had been incorporated and previously governed, should be read and construed and have effect as if the changes of expression therein mentioned (thb effect of which would be to make them speak as Acts of the Canadian Parliament) had been made in them; that so read and construed and taking effect, they should be deemed to be special Acts according to the true intent and meaning of "The Railway Act, 1868," and that no part of "The Quebec Railway Act, 1869," should be incorporated with the said special Acts, or either of them, or form part thereof, or be construed therewith as forming one Act.

These provisions, taken in connection with and read by the light of those of the Imperial Statute, "the British North American Act, 1867," which are contained in Section 91, and Sub-section 10 *c* of Section 92, establish. to their Lordships' satisfaction, that the transaction between the Company and the Government of Quebec could not be validated to all intents and purposes by an Act of the provincial Legislature, but that an Act of the Parliament of Canada was essential in or order to give it full force and effect. This proposition was, finally, hardly disputed by the learned Counsel for the respondent, but they relied upon the 8th clause of the deed, and the 46th Section of the Quebec Act, as showing that recourse to the Parliament of Canada for its sanction was within the contemplation of the parties, and contended that, before that sanction was obtained, the transaction was valid for some purposes, and gave certain inchoate rights which were capable of being asserted. In support of their argument they cited The Great Western Railway Company *v.* The Birmingham and Oxford Junction Railway, 2 Phill. 597, and what was said by Lord Cottenham in that case. It is to be observed, however, that Lord Cottenham, when ruling that the contract, which could not be fully carried out without Parliamentary sanction, was not, in the absence of such sanction, to be treated as a nullity, and that some of its provisions might neverteless be binding, was dealing with the rights of the parties to the contract *inter se*. Here the public, and the creditors of the Company, in which category the appellants fell since the questions raised by these two appeals must be considered as if the award were valid, were no parties to the transaction, and could not be affected by it until it was fully validated by an Act of the Parliament of Canada, to obtain which no attempt seems ever to have been made. In their Lordships' opinion, therefore, the tracsaction, considered as a whole, was of no force or validity as against the rights of the appellants when the decisions of the Canadian Courts upon the intervention and the opposition were passed.

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This being their Lordships' conclusion they proceed to consider how it affects the two appeals, and first that which relates to the Attorney General's intervention. Now, if it be admitted, for the sake of argument, though their Lordships must not be taken to affirm the proposition, that the Attorney General had such an inchoate right under the transaction as would have justified his intervention had there been reason to suppose that the expiring Company would fail to make a substantial defence to the action No. 1,213, it is to be observed that that was not the actual state of things. The action itself was not commenced until December, 1876, and the defences of the Company were filed on the 30th of that month. The transaction between the Company and the Quebec Government was completed, so far as it was completed, in December, 1875. It is, therefore, obvious, that, in the first instance, the Quebec Government intended to defend the action, in the name of the Company; under the provisions of the deed. All objections which the Company could take to the award, and in particular the one which has proved fatal to it, were taken in their defences. The interuention of the Attorney General was not until 1878, and the reasons filed by him on the 17th of September in that year are sufficient to show that object of the intervention was to raise objections to the validity of the award, founded upon the attempted transfer of 1875, which could not have been taken in the name of the Company. Those reasons, the contestation of them, and the other pleadings show that the new issues raised between the parties were the validity of the transfers as against the appellants, the right of the Commissioners under the Quebec Act to continue or discontinue the proceedings in the expropriation, the abandonment of the Railway, and its transformation into a new railway, to de constructed under different conditions. This intervention was only necessary for the trial of these fresh and additional issues; and was, as the Court of Queen's Bench itself has found, wholly unnecessary for the trial of the original issues. Upon the trial of the action in the Superior Court, Mr. Justice Mackay expressly found "que les faits allégués dans "la dite intervention, savoir le transport des droits et actions de la dite "défenderesse au Gouvernement de la dite province de Québec, n'a pas "été prouvé avoir lieu légalement," a finding in accordance with the conclusion to which their Lordships have come touching the transaction of 1875, and one which would justify the di-missal of the intervention, even if the learned Judge have taken a view different from that which he did take of the validity of the award. The Attorney General had failed to show any grounds for inflicting upon the appellants the costs of unnecessary and expensive proceedings. In these circumstances, their Lordships are of opinion that the Court of Queen's Bench ought to have dismissed the appeal of the Attorney General, and to have affirmed the judgment of the Superior Court, in so far as it related to the intervention, with costs.

Their Lordships have now to consider Appeal No. 144, which arises out of the "opposition à fin de distraire." That opposition to the execution could not succeed as to such of the lands seized as had belonged to the Company, unless it were established that the property in those lands had been changed by the attempted transfer of 1875. Their Lordships are of opinion that there was no such change of property. The transaction, viewed as a whole, and as one single contract, could not, for the reasons above stated, operate as a valid transfer of the lands of the Company to the Government of Quebec. Their Lordships feel bound to dissent from two propositions, on one of which the judgment of Mr. Justice Johnson, and on the other of which the judgment of Chief Justice Dorion, in part proceeds. Mr. Justice Johnson ruled that the contestants ought, if they questioned the validity of the transaction of 1875, to have concluded that it should be set aside or declared null, and that, by reason of their failure to do so, they must be taken to be bound by it. Chief Justice Dorion expressed an opinion that it was only at the instance of the Government of Canada (the Dominion), or of an individual who could show that he had a special interest distinct from that of the public, that the transfer could be set aside. These reasons are some what contradictory, and their Lordships cannot think that either affords a good ground for the judgment impeached. If the transaction, not having the sanction of the Parliament of Canada, were *ultra vires* of the Company and the Government and Legislature of Quebec, it was of no legal force or validity against the appellants, and might be so treated by them whether it were formally set aside or not. The other ground on which the judgment proceeds, and which has been chiefly insisted upon here, is more plausible. It is that the Company had power, under the second Sub-section of the 7th Section of "The Railway Act, 1868," to "alienate, sell, and dispose of its lands;" that the transaction of 1875, even if invalid as a whole, is severable, and that the Company must be taken to have sold by it their land to the Government of Quebec in the exercise of that power. Their Lordships cannot accede to this argument. It appears to them that the contract is not severable in the manner suggested. It is contract whereby, for the same consideration, everything which it purported to pass was intended to pass. Suppose what was suggested by Chief Justice Dorion were really to happen, that the Dominion Government were to take steps to set aside the transaction, could the Government of Quebec be heard to say, "True, the transaction will not stand as a "transfer of the railway, or of "the rights, powers, liabilities, and duties of the Company, but it may "enure as a sale of the lands acquired in order to the construction of "the railway, or part of them, in the exercise of the power in question." Would not the answer be, "There is no trace of such a contract, or of an "intention to make it?"

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By the evidence taken on this proceeding, it appeared that a con-

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siderable part of the lands, rolling stock, and other property seized, had never belonged to the Company, but had been purchased by the Commissioners since 1875.

In respect of that property, the Attorney General was entitled to succeed in his opposition. He should, however, have been held to have failed as to the lands, &c., which had belonged to the Company. And in their Lordships' opinion, the proper order to be made was one which would have upheld the seizure as to this latter part of the property in question, whilst it granted main levée as to the rest, leaving each party to pay their own costs. Since the execution must now altogether fail by reason of the award having been set aside, it will not be necessary to draw up a formal order to the above effect.

The order which their Lordships will humbly recommend Her Majesty to make on the four consolidated appeals will be to the following effect, viz. to dismiss the appeals numbered respectively 13 and 144, and to allow those numbered respectively 117 and 141; to affirm the judgment of the Court of Queen's Bench (Record 180) in the suit No. 693, wherein the Company was plaintiff, and the appellants and others were defendants: to reverse so much of the judgment of the Court of Queen's Bench Record 286) in the action 1213, wherein the appellants were plaintiffs, and the Company were defendants, and the Attorney General intervenor as relates to the intervention of the Attorney General, and in lieu thereof to affirm so much of the judgment of the Superior Court in the same suit as relates to such intervention; with the costs of the appeal to the Queen's Bench; but to affirm in all other respects the last-mentioned judgment of the Court of Queen's Bench; to reverse the judgment of the Court of Queen's Bench in the matter of the "opposition à fin de distraire," and to declare that in lieu thereof, an order should have been made reversing the judgment of the Superior Court in such matter, and declaring that the opposition should have been allowed as to so much only of the property seized as had been purchased by the Commissioners since 1875, and disallowed as to the rest, and that each party should bear their own costs in both Courts, but that by reason of the failure of the execution in consequence of the setting aside of the award, it had become unnecessary to draw up any such order.

Their Lordships are of opinion that, under the circumstances, no order should be made as to the costs of these consolidated appeals.

PRIVY COUNCIL,

London, 18th April, 1883.

Carter & Molson.

Coram: Lord Blackburn, Sir Barnes Peacock, Sir Richard Couch, Sir Arthur Hobhouse.

CARTER *v.* MOLSON.

The question, which their Lordships have found to be one of considerable difficulty, depends on the true construction of the two codes of Lower Canada, the Civil Code, more particularly art. 2274 and arts. 2613 and 2614, and the Code of Civil Procedure, more particularly art. 766 and those following it, and art. 1360. There were careful and elaborate provisions for framing the two codes in question: but, notwithstanding all the precautions taken, there may be, and in fact in the present case there are, doubts as to what is the meaning of the language employed. And the Civil Code of Lower Canada, art. 12, is "that when a law is "doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the Legislature, and to attain the object for which it was passed."

It is therefore material to inquire how and why the codes were enacted, so as to ascertain what was the intention of the Legislature, and what the object for which they were enacted.

First, by Statute 20 Vict., c. 43, which afterwards became the second chapter of the Consolidated Statutes of Lower Canada, Commissioners were appointed, who were directed (secs. 4, 5 and 6) to reduce into one Code, to be called the Civil Code of Lower Canada, those provisions of the laws of Lower Canada which relate to civil matters, and are of a general and permanent character, whether they relate to commercial cases or others, but excepting the laws relating to the seignorial or feudal tenure, and to reduce into another Code, to be called the Civil Code Procedure of Lower Canada, those provisions which relate to procedure in civil matters and cases, and are of a general and permanent character. They were directed to embody therein such provisions only as they held to be then actually in force. They might suggest such amendments as they thought desirable, but were to state them separately. And they were directed to follow, as far as might be, the arrangement of the *Code Civil* of France. It was provided that, as the commissioners proceeded with their work from time to time, there should be an opportunity given to the Judges to review their work, and make suggestions to the commissioners, who were to consider, but were not bound to adopt their suggestions. And by sect. 13 the commissioners were required from time to time to incorporate with the proper portions of the said Codes such amendments as the Governor in Council thinks it right to recommend for adoption by the Legislature after considering the reports of the commissioners, and those of the judges if any, but such amendments shall be carefully distinguished from the actual law.

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And then by sect. 14, " When the said Codes, or either of them, are " completed, with such amendments as last mentioned, printed copies " thereof, and of the reports of the commissioners, and of the judges if " any, shall be laid before the Legislature, in order that such Code or " Codes may be made law by enactment ; and if it be found advisable " that either of the said Codes be completed and submitted to the " Legislature before the other, the Civil Code of Lower Canada shall be " the first so completed and submitted.

" 2. Either House may propose any amendments to either Code, " but such amendments shall be proposed by resolutions, which may be " passed by the one House and sent to the other for its occurence, and " shall be subject to amendment by the other, and be dealt with as a " Bill might be until finally agreed to by both Houses, and shall then be " communicated to the commissioners, who shall with all possible des- " patch incorporate the substance of the amendments so agreed to with " the proper Code, which may then be passed as a Bill at the same or " any other session."

The Civil Code was the first completed and submitted to the Legislature, and it was amended by resolutions agreed to by both houses, but the Legislature did not quite pursue the course indicated by the latter part of sect. 14, sub-sect. 2. By 29 Vict., c. 41, sect. 2, the commissioners were directed to incorporate the amendments with the Civil Code, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments.

Power was also given to the Governor to select any Acts and parts of Acts passed during the last and present sessions, and cause them to be incorporated. And power was given to the commissioners to make verbal and formal amendments, and so soon as the said work of incorporation was completed the amended Code was to be submitted to the Governor, who may cause a correct printed copy thereof, attested by his signature and that of the Provincial Secretary, to be deposited in the office of the clerk of the Legislative Council.

Then by sect. 6. " The Governor in Council may after such deposit " of the roll last mentioned, declare by proclamation the day on and " after which the said Code, as contained in the said roll, shall come " into force and have effect as law, by the designation of ' the Civil Code " of Lower Canada,' and upon, from, and after such day the said code " shall be in force accordingly." The Governor in Council, by proclamation, named the 1st August, 1866, as that day.

A precisely similar course was taken as to the Code of Civil Procedure of Lower Canada, the Statute 29 & 30 Vict., c. 25, being in the same words as those of 29 Vict., c. 41, except that (Code of Civil Peoce- dure of Lower Canada) is throughout substituted for (Civil Code of

Lower Canada.) The day fixed by the proclamation for this Code coming into force is the 28th day of June, 1867.

So that there was a period of nearly ten months, during which the Civil Code was in force, before the Civil Code of Procedure came into force.

It seems implied in that part of the judgment which states "that there are express provisions "in the Code of Procedure as to those matters," and that "the provisions of Sects. 12 and 18 of the Consolidated Statutes and "Art. 2274 of the Civil Code have thereby been "repealed under Sect. 1360 of the Code of Civil Procedure," that the majority of the Court of Queen's Bench put the construction on Art. 1360 of the Code of Civil Procedure, that it repealed not only all laws in force before the passing of either code, but also all parts of the Civil Code which touched procedure.

The literal meaning of the words "laws in force at the time of the "coming into force of this code" includes the Civil Code, for, as already pointed out, the Civil Code came into force some months before the Code of Civil Procedure did; but their Lordships are scarcely prepared to hold that the intention and object of the Legislature was that when a matter is included in the Civil Code which might without impropriety have been included in the Code of Procedure, and an express provision is made in the Code of Procedure upon that particular matter, the provisions of the Civil Code are abrogated as being laws concerning procedure in force at the time when the Code of Procedure came into force. The two subjects from their nature overlap, and in the Code Civil of France, as well as in the Canadian Codes, much which might well be put into the one code is placed in the other. There seems nothing to prevent laws in both codes relating to the same subject from standing together, unless they are from their nature so inconsistent that the later enactment must be taken to repeal the earlier.

The 20th title of the Canadian Civil Code, relating to imprisonment in civil cases, is one which might have been placed under the head of procedure; and so might the 16th title of the French Code Civil, entitled, "De la Contrainte par Corps en Matière Civile," have been placed in the "Code de Procédure Civile." But neither in the Canadian Codes nor in the Frence Code has this been done.

The general intention and object of the Legislature seems to have been that the two codes should stand together, and be construed together, and it may well be doubted whether the majority of the Queen's Bench have not given too much effect to the accident that the codes did not come into force on the same day.

It is not, however, necessary to decide this, as, by a different chain of reasoning the same result may be come to.

The preamble to the Statute 20 Vict., c. 43, which afterward became the Consolidated Statutes, chap. 2, is this :—

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"Whereas the laws of Lower Canada in civil matters are mainly those which at the time of the cession of the country to the British Crown were in force in that part of France then governed by the custom of Paris, modified by provincial statutes, or by the introduction of portions of the law of England in peculiar cases; and it therefore happens that the great body of the laws in that division of the province exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin. And whereas the laws and customs in force in France at the period above mentioned have there been altered and reduced to one general code, so that the old laws still in force in Lower Canada are no longer reprinted or commented on in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them. And wheas the reasons aforesaid and the great advantages which have resulted from codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the codification of the civil laws of Lower Canada."

From this preamble and the whole scheme of the legislation, their Lordships think that it was one main object of the Legislature to make the codes as one may say self-contained. This object, however, has been apparently lost sight of in several places, and, amongst others, in the Art. 2274 of the Civil Code, which is in the following words:—

"Any debtor imprisoned or held to bail in a cause wherein judgment for a sum of 80 dollars or upwards is rendered, is obliged to make a statement under oath, and a declaration of abandonment of all his property for the benefit of his creditors, according to the rules and subject to the penalty of imprisonment in certain cases, provided in chap. 87 of of the Consolidated Statutes for Lower Canada, and in the manner and form specified in the Code of Civil Procedure."

This cannot be understood, without reading and construing the statute referred to in order to see what rules and what penalties of imprisonment were provided by the statute, and then determining which of them were kept alive by this Article; for, though this Article does contain an express provision on at least part of chap. 87, and so by Art 2613 and 2614 of the Civil Code does abrogate at least so much of chap. 87, yet it seems impossible to deny that the Legislature did intend, at all events until the Code of Civil Procedure should come into force, to re-enact by reference to the abrogated statute some penalties, and apply them to the things specified in Art. 2274. And there is great difficulty in doing this. For though chap. 87, s. 12 (1) does, in certain cases included in Art. 2274, but not quite co-extensive with it, require a debtor against whom judgment for 80 dollars or upwards has been rendered to file a statement of his property and creditors, and a declaration of his willingness to abandon the property in his statement mentioned to his

creditors, and by sect. 12 (2) does impose penalties on a defendant neglecting to file such statement, yet there are no penalties co-extensive with Art. 2274, and there certainly are many penalties which, by chap. 87, s. 18, are imposed upon debtors who have not been arrested, against whom a judgment has gone in a commercial cause, which cannot on any construction be kept alive by Art. 2274. Those difficulties are all removed if Art. 2274 is read as meaning "according to the rules and subject "to the penalty provided in certain cases in chap. 87, *until the Code of "Civil Procedure comes into force, and then* in the manner and form "specified in the Code of Civil Procedure."

It is not to be denied that this is introducing words not to be found in the enactment, and so far is objectionable. But their Lordships think that Art. 2274 of the Civil Code shows an intention on its face to hand over the whole of its subject matter to be dealt with by the provisions of the Civil Code of Procedure, or if that intention cannot be found on its face, then that the law contained in that enactment is 'doubtful and ambiguous,' and though not without some doubt and difficulty, they think that the object and intention of the Legislature is such as to justify this construction.

If it is adopted all difficulty vanishes. The articles of the Code of Civil Procedure do impose many penalties, but they do not impose the penalty of imprisonment for a year on the person refusing to perform that duty which he is by the express terms of Art. 766 bound to perform.

The question how he is to be compelled to do so does not arise on this appeal. It is enough to say that he is not liable to imprisonment for a year,

Their Lordships think that the appeal must be dismissed. They will so humbly advise Her Majesty.

The appellant must pay the costs of this appeal.

Appeal dismissed.

(S. B.)

Carter & Molson.

PRIVY COUNCIL.

London, July 4, 1885.

Coram: Lord Watson, Sir Barnes Peacock, Sir Richard Couch, Sir Arthur Hobhouse.

CARTER *v.* MOLSON.—HOLMES *v.* CARTER.

Per Curiam. On the 9th of February 1875, John Thorold Carter advanced $30,000 upon a mortgage, by which the borrower, Alexander Molson, became bound to repay that sum in six years, and also to pay intrest, half yearly, at the rate of 7½ per cent per annum ; and, in security for the due payment of principal and interest, mortgaged and hypothecated a lot of ground and a tenement erected thereon, situated in St. James Street, Montreal. Thereafter, on the 17th of April 1877, in consequence of default in payment of interest, Carter recovered judgment in the Court of Queen's Bench against Molson, founded on his personal convenant in the deed of mortgage, for $31,125 being the amount of principal and interest due at 1st January 1877. In virtue of that judgment, Carter proceeded to attach, by writ of Saisie-arrêt, the rents of the mortgaged property in St. James Street, which had been let to one Allan Freeman, and also the divividends which had accrued or might accrue upon 148 shares of the stock of Molsons bank, which stood in the books of the bank, in the name of "Alexander Molson, "in trust for Eliza A. Molson *et al.*"

The right of his creditor to attach these rents and dividends was contested by Alexander Molson, upon the allegation that the St. James Street property, as well as the bank stock, formed part of his one-fifth share of the residue of the estate of his late father, John Molson ; that, by the will of the deceased, his right to both was *grevé de substitutions*, in favour of his wife and family, and his usufruct was expressly declared to be *legs d'aliment*, and not arrestable for his debts. In the course of the litigation which followed, two separate petitions were presented for leave to intervene, the one by Eliza Ann Holmes, wife of the debtor, in her own right, and the other by the same lady as tutrix *ad hoc* to their minor children, along with their daughter Elizabeth, who had attained majority

In the Superior Court, Mr. Justice Papineau, upon the 30th June 1881, rejected the contestation of the judgment debtor, with costs, and sustained the right of the arresting creditor, both as to rents and dividends . and, at the same time, in both applications for intervention, the learned Judge decided, with costs, against the petitioners. The Court of Queen's Bench, upon the appeal of Alexander Molson, by their judgment rendered on the 24th March 1883, in substance affirmed the decision of Mr. Justice Papineau, so far as concerned the dividends, which they to have been validly arrested in the hands of the bank ; but

reversed his decision, in so far as it related to the rents of the St. James Street property, and quashed the attachment made in the hands of Allan Freeman. The debtor was condemned to pay to the arresting creditor the costs of the contestation with regard to the bank dividends in the Court below ; whilst the creditor was condemned to pay to his debtor the costs of the contestation in the Court below with regard to rents, as well as the costs of the Appeal. By a separate judgment of the 24th March 1883, the Court of Queen's Bench, in the appeals taken by the intervening petitioners, rejected their contestation, and confirmed the decision of Mr. Justice Papineau, with costs.

Against these judgments four separate appeals have been presented to Her Majesty in Council. Mr. Carter complains of the decision of the Queen's Bench, in so far as it reverses the judgment of the Superior Court and quashes his arrestment of the rests of the St. James Street property ; Alexander Molson complains of decisions of the Court below sustaining the writ of Saisie-arrêt as regards dividends arising upon the 148 bank shares ; and the intervening petitioners complain of the decision by which their respective contestations have been rejected. These appeals have been consolidated, and heard as one cause, but must now be separately disposed of, inasmuch as they do not depend upon the same considerations either of fact or law.

To begin with the rents of the St. James Street property. It was argued for the appellant Carter that there has been no deed or document registered which constitute a legal act of substitution, or, in other works, discloses the fact that the title of his debtor to that property is herived by testamentary gift from his father, the late John Molson, and is therefore affected by the conditions and limitations appearing in the will of the deceased. It was said that, *ex facie* of the register, the property is vested in Alexander Molson, not as a legatee, but as a purchaser for value from the administrators of his father's will ; and, consequently, that the appellant, an onerous creditor who advanced his money on the faith of the register, is not affected by the latent conditions of the will. It was also maintained for this appellant that, inasmuch as, by the deed of mortgage of February 1875, Alexander Molson declared tnat the property well and truly belonged to him, he is now estopped from alleging, in this suit, that it is in really held by him as an integral part of his share of his father's succession.

In the argument addressed to their Lordships from both sides of the bar, it was conceded that the substitution imposed by the 13th article of John Molson's will upon the share of Alexander Molson, in favour of his widow and issue, cannot receive effect against a creditor in the position of the appellant unless the substitution be duly registered (C. C., Sects. 938), so as to give him due notice of the interests of the substitutes. Mr. Justice Papineau decided this branch of the case against the judgment debtor, upon the assumption that the will of

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John Molson had not been registered. That assumption seems to have been based upon a somewhat strict and technical interpretation of an answer made for Alexander Molson to the 13th interrogatory contained in the articulation of facts filed for the appellant on the 16th March 1879. There is ample evidence to show that the will was, in point of fact, duly registered in November 1860; and having regard to the very inartificial and ambiguous character of the interrogatory in question, their Lordships do not hesitate to agree with the Court of Queen's Bench in holding that the registration of the will has been sufficiently established.

In February 1875, when the appellant lent his money to Alexander Molson, there were already two deeds on the register, evidencing the title by which the borrower held the St. James Street property. The one of these was the will of John Molson already referred to, and the other was a deed, dated the 15th June 1871, and registered the 11th June 1872, by which William Molson, and the judgment debtor Alexander Molson, as acting executors and trustees under the will, sold, assigned, and transferred that property to the said Alexander Molson. It does not appear to their Lordships to admit of dispute that all persons who transacted with Alexander Molson on the faith of his being the owner of the St. James Street property were bound to inform themselves of, and must be held to have known, the tenor of these two deeds, because the deed of 15th June 1871 constituted Alexander Molson's immediate and only title to the property, and it sets forth, *in gremio*, that his authors held the property under the trusts of John Molson's will, and had transferred it to Alexander Molson by virtue of a power of sale said to be contained in the will. Accordingly, if it be the case (as the Court of Queen's Bench have held), that the deed of June 1871, though professing to give effect to a transaction of sale, was in reality a conveyance to Alexander Molson of that which had been allotted to him as part of his fifth share of the residue of his father's estate, and that the terms of the registered deeds were sufficient to notify that fact to the appellant, or to put him upon his inquiry in regard to it, it seems to follow that he cannot prevail in this appeal. In that case, the property would be identified, on the face of Alexander Molson's title, with his share of residue under his father's will; and every person dealing with him on the faith of that title would either have the knowledge, or the means of informing himself, that the property, as part of that share of residue, was *grevé de substitutions*, in favour of Alexander Molson's wife and children, and that his usufructuary interest was not arrestable.

The evidence adduced in the Superior Court establishes, beyond all doubt, that there never was any contract, between Alexander Molson and the administrator of his father's will (of whom he was one), for the purchase and sale of the St. James Street property. The property

was, no doubt, exposed to public auction, along with other heritable subjects forming part of the residue, and the whole subjects so exposed were knocked down to two gentlemen, other than Alexander Molson, who each represented beneficiaries entitled to one-fifth of residue. But these gentlemen were merely nominal purchasers. The auction sale was not resorted to for the purpose of selling and dividing the proceeds,—the only purpose for which a sale was authorized by the will,—but for the purpose of ascertaining the value of the subjects exposed, in order to their partition among three of the five residuary legatees. Accordingly these legatees, after the auction sale, at which Alexander Molson was not a buyer, agreed to devide the subjects which had been exposed, not according to the prices at which they had been knocked down, but according to an estimate based on an average of those prices. Upon that footing, the St. James Street property was allotted to Alexander Molson, as part of his share; and there appears to be no ground whatever for supposing that the trustees of the will thereafter sold to him his allotted portion for the amount of the estimation, even if such a sale had been within their power, which it clearly was not.

The deed of 15th June 1871 purports to be a conveyance of the property in question to Alexander Molson, in pursuance of a contract by which the trustees of his father's will had sold it to him for the amount at which its value was estimated for the purpose of partition, as already explained. In point of fact, the deed appears to have been framed by the grantors in flagrant disregard of their duty as trustees, and to have been a colourable and not very creditable device for giving Alexander Molson a larger interest in the property than he was entitled to, and for defeating the intentions of the testator with respect to substitutions and the *iusaisissabilité* of his son's usufruct. Although that is proved, in the estimation of their Lordships, to have been the true nature of the deed of 15th June 1871, it does not follow that the conditions of John Molson's will could be held to affect the property in a question with any onerous creditor of Alexander Molson, to whom the deed itself gave no notice, and who had no knowledge otherwise of its real character. But the deed of June 1871 refers to, and by reference, incorporates certain deeds of transfer and agreement executed by the executors and trustees of the will of John Molson, for the purpose of vesting his share of residue in Alexander Molson, and one of these deeds, dated 15th June 1871, appears to their Lordships to indicate very plainly that the St. James Street property had not been sold for the purpose of dividing the price, but had been allotted to Alexander Molson as part of the *corpus* of his share of residue. At all events, the terms of that deed, and its relative schedules, appear to their Lordships to be quite sufficient to notify to any person dealing with Alexander Molson, on the faith of the deed dated 15th June 1871, and registered 11th June 1872, that the transaction which it professes to embody was, in reality, either a legal partition or an illegal sale.

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It is, however, hardly necessary, for the purposes of this appeal, to determine what would have been the effect of these indications of the true character of the so-called deed of sale, derivable from its own terms, upon the rights of a creditor of Alexander Molson, who had no information, except that which he had obtained, or might have obtained, through the register. The appellant, Mr. Carter, does not occupy that position. His agent in negotiating and carrying through the loan transaction of 9th February 1875, was the Hon. J. J. C. Abbott, who is proved to have been cognizant of the whole proceedings in the distribution of the residue of John Molson's estate, and to have taken an active part in advising and completing the arrangements by which his fifth share, including the St. James Street property, was transferred to Alexander Molson. The appellant is affected by the knowledge of the agent to whom he confided the duty of attending to his interests, and that knowledge was amply sufficient to inform its possessor that the deed conveying the St James Street property to Alexander Molson, though professedly a deed of sale, was in substance and reality the transfer of an estate which had been specifically allotted to him as part of his share of residue. In these circumstances, their Lordships are of opinion that the appellant Carter must be treated as having full knowledge that the property was vested in his debtor, subject to all the conditions and limitations imposed by the will of John Molson.

Next, as to the appeal of Alexander Molson with regard to bank dividends. The writ of Saisie-Arrêt has only been sustained, as an attachment of the dividends which may become payable to Alexander Molson in respect of the 148 shares in question. The sole ground upon which these dividends are said to be placed beyond the diligence of his creditors is, that the 148 shares either are, or represent, part of 640 shares of the stock of Molson's Bank which were transferred to Alexander Molson, as integral portion of the fifth share of residue, settled upon him and his wife and family by his father's will. Their Lordships see no reason to differ from the law laid down by C. J. Dorion, to the effect that these dividends would be protected from arrestment by the 18th article of John Molson's will, if it were proved to be the fact that the 148 shares from part of the 640 originally transferred to Alexander Molson by the executors of the will, or were purchased with the proceeds of these original shares. Accordingly the only question requiring to be decided, in this appeal, is one of fact. Their Lordships are willing to assume (although it is unnecessary to decide) that the *onus* of proving that these 148 shares neither are nor represent any part of the residue of John Molson's estate lies upon the arresting creditor. He has proved, by clear and satisfactory evidence, that, at and prior to the 12th May 1873, Alexander Molson had divested himself of the whole of the 640 shares which had been transferred to him, in 1871, by his father's executors; and that 115 of the 148 shares in question never belonged to his

father's estate, having been vested in Alexander Molson before the residue was divided. That evidence, in the opinion of their Lordships, not only establishes the right of Mr. Carter to attach the dividends arising upon these 115 shares, but throws upon the appellant, Alexander Molson, the *onus* of showing that the remaining 33 shares were either part of or purchased with the proceeds of the 640 shares, neither of which facts has he made any attempt to prove.

Then as to the appeals presented by the intervening petitioners. Both of these depend upon precisely the considerations, and may be disposed of as if they were one appeal. The petitioners have not, and do not assert that they have any direct or legal interest, either in the rents of the St. James Street property, or in the dividends on the 148 bank shares, which accrue and become payable to Alexander Molson during his lifetime. On the other hand, it is not disputed that they have material interests, entitling them to resist any attachment of the *corpus* of the property or of the shares, at the instance of a creditor of Alexander Molson, which might have the effect of defeating their right as substitutes, in the event of Alexander Molson's death. They do not, however, allege that the writ of saisie-arrêt will attach either the *corpus* of the 148 bank shares, or the dividends accruing upon them, after the death of Alexander Molson. All that they do allege is, that these shares as part of the residue of his Estate are subject to the substitution in their favour contained in John Molson's will, and that the dividends payable to the institute are, in terms of that will, not arrestable. The only interest in respect of which their right to intervene in the present litigation is maintained, is the apprehension that some points may be incidentally decided, between the arresting creditor and Alexander Molson, which may prejudice their rights at some future time. It is not said that any judgment in this suit can possibly enable the creditor to attach the estates which they may eventually take, assuming the substitutions in their favour to be valid; nor is it suggested that anything decided in this suit between the judgment debtor and creditor, with regard to the validity of these substitutions would be binding upon them as *res judicata*. What they do plead is that such a decision might afford an objectionable precedent, if and when they require to assert their rights judicially, and consequently, that they have the right to intervene. That plea appears to their Lordships to be untenable. Section 154 of the Procedure Code, which regulates this matter, gives the right of intervention to the parties who are "interested in the event of a pending "suit." The event of the suit can only refer to the operative decree which may ultimately be given in favor of one or other of the parties to it, and not to the views of fact or law which may influence the Court in giving decree. To admit the appellant's plea would involve the admission of a right to intervene on the part of every person who had an interest in preventing a deci-

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sion being given *inter alias*, which might be cited as an authority against him in some other suit. Section 154 appears to have been framed for the very purpose of limiting the right of intervention to those persons who can show that a final judgment may possibly be obtained in the suit, which will enable the party who obtains it to possess himself of their estate, or otherwise to impair their legal rights.

Their Lordships are accordingly of opinion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. There will be no order as to the costs of any of these appeals.

Appeal dismissed.

JUDICIAL COMMITTTEE OF THE PRIVY COUNCIL.

Chevigny de la Chevrotière & Cité de Montréal.

London, Nov. 16, 1886.

Before LORD FITZGERALD, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD COUCH.

CHEVIGNY DE LA CHEVROTIÈRE *v.* LA CITÉ DE MONTRÉAL.

The action from which this appeal arises was commenced in the Superior Court of the province of Quebec, Lower Canada. The demandant, who is also the appellant, claimed to be proprietor of about seven-eighths of that part of the city of Montreal which from 1803 to January 1847 had been a public market, and from January 1847 to the present time has been an open public place in the city, known as the Place Jacques Cartier. The demandant claimed against the respondents, the city of Montreal, a right to resume possession of that piece of land as in the original ownership of the grantors. His money claim against the city amounted to 130,866 dollars. Further, he claimed that the original deed of grant of 29th December 1803 should be brought in and declared null and void. The claim is said to have arisen under that deed so often referred to in the course of the case.

It was said to have been a purely voluntary gift, but their Lordships think, if it were necessary to express an opinion on it, it might be doubtful whether it was voluntary, and whether its true character was not a grant to the magistrates of the city of Montreal for valuable consideration.

The place in question was originally the property of the Seminary Montreal, and the Seminary, being about to dispose of it, entered into a treaty withe Périnault and Durocher. The property appears to have been made over to Périnault and Durocher to make the most they could of it, but under a condition that they were to pay to the Seminary a sum of about 3,000 guineas. They proceeded accordingly to divide it for building purposes; but reserved a portion, and they entered into treaty

with the concessionaires, who stipulated that there should be not only the Rue de la Fabrique (which did not then exist as a street, but was *projetée* only), and also that the open space lying between the Rue de la Fabrique and the Rue St. Charles should be converted into a public market. Périnault and Durocher, being unable to comply with that condition without the aid of some public body, applied to the magistrates at Montreal, as they could create a public market, and it was necessary to seek their aid, and out of this sprang the grant of the 29th December, 1803.

The result of that deed seems to be, that it created a public right as well as a private servitude,—that is, when that deed had been carried out by converting the open space, which is now the subject in question, into a public market place, with a right in the public to resort to it as a public market place,—it became subject to that public right, at the same time, possibly, being subject to a private servitude to the parties who had become concessionnaires of the building plots. Their Lordships do not find it necessary to express any opinion upon the general construction, or upon the effect of the condition contained in the grant of 1803. They assume, but for the purposes only of the judgment which is about to be delivered, that the demandant's contention may be right, that when there was a breach of that condition, the donors or their representatives would be entitled to re-enter and to resume possession as of their former estate.

Several questions of very considerable importance and difficulty have been raised before this Committee. One was suggested by one of their Lordships—whether the condition was apportionable, and, if not apportionable, whether the demandants could sue, not being the owners of nor interested in the whole of the property which is the subject-matter of the condition. On that question also, their Lordships do not find it necessary, in their present judgment, to express any opinion.

There were also questions whether the condition of re-entry was void in its inception, whether it was a condition of re-entry properly, or was merely inserted in the deed of gift *in terrorem*, and merely *comminatoire.*

There was also a question of prescription and other questions in the case upon which their Lordships do not propose to express any opinion, as the appeal may be disposed of on another and satisfactory ground.

The magistrates of Montreal having got possession of the land under that deed of 1803, and converted it into a public market, we come next to the Ordinance of 4 Vict., by which the magistrates ceased to be the managing body of the city of Montreal, and were replaced by a quasi-corporate body. That leads to the 8 Vict., c. 59. The magistrates in Montreal had accepted this deed of 1803, which, whether it was for valuable consideration, or a simple voluntary deed, was a deed of grant for ever. The words are "*maintenant et à toujours*"—but subject to the

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condition, whatever the effect of it was. Therefore, at the time of the incorporation of the city, the magistrates were, as trustees for the public, in ownership of this land in perpetuity, subject to the condition, with this market upon it; and over this public market place, not inhabitants of the city alone, but the public at large had acquired considerable rights.

That being the position of affairs, there came the Canadian statute of 8 Vict., c. 59; that statute is not a general Act dealing with all corporations, but with Montreal alone. It is to give greater potency and effect to the incorporation of the city of Montreal and to enlarge the powers of the corporate body. It gives them very extensive powers over the city, and amongst other things it says, in the 50th section, that they shall have power of "changing the site of any market or market "place within the said city, or to establish any new market or market "place, or to abolish any market or market place now in existence, or "hereafter to be in existence in the said city, or to appropriate the site "thereof, or any part of such site for any other public purpose what-"ever, any law, statute, or usage to the contrary notwithstanding; "saving to any party aggrieved by any act of the said council respecting "any such market or market place any remedy such party may by law "have against the corporation of the said city for any damage by such "party, sustained by reason of such act" of the corporation.

Now it was contended that, acting under that statute and converting this market place to another public purpose, was no breach of the condition, and that the effect of the statute was to discharge the condition and leave it open to the corporation, acting for the public interests, to appropriate the site of that market place to any other public purpose, but subject to a claim for compensation by the demandant here and the parties he represents, if they had title, and had been injured by the act of the corporation. Now upon this very important question as to the effect of this statute, their Lordships do not think that it is necessary at present to express any opinion.

Proceeding under the powers that they had so obtained in December, 1847, the first by-law was made. In that, the corporation indicate their intention to abolish this market and apply the site to another public purpose, and their Lordships can have no doubt, that in taking that step, the corporation were moved only by considerations of public good. They found it necessary, probably, to supply the growing city with a larger market place, for Montreal in 1847 was a very different place from the Montreal of 1803, growing and extending every day, and still growing and becoming one of the most beautiful cities in the world. They very likely thought that a larger market place was necessary, but that they ought to retain the space occupied by the market as an open space for the public good and the public health, and hence they converted it into the Place Jacques Cartier.

In January 1847 the act of conversion was made complete, and there was also a subsequent by-law by which they directed that the new place should be henceforward called the Place Jacques Cartier.

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Their Lordships assume also, for the purposes of the case, that, upon the happening of these events, whatever rights if any the demandant or those he represents had under the condition in the grant of January, 1847, that is, that they were then entitled, if at all entitled, to put their claims in force and to institute a proceeding against the corporation to take advantage of the condition annexed to the gift of 1803, and to resume possession of this plot of ground or to get compensation for the act of the corporation. But they did not do so, and things went on as before from 1847 to 1852. The effect of the transaction of January, 1847 was, to convert, by the act of the corporation, the old market place into a public square which the citizens of Montreal and the public had a right to use.

Things continued in that condition down to 1852, when Perrin instituted his action. That action may be described with substantial accuracy as similar to the present. It made the same case. The present demandant is the assignee of Perrin's interest. Perrin's action the corporation defended. They put in exceptions similar, save in one respect, to those now before their Lordships. It was allowed to sleep for some six years. The case was then set down for hearing before the proper Court in Canada, and was dismissed, either for want of prosecution, or on the merits. Perrin never instituted any other proceeding. He appears to have lain dormant for 19 years, and in 1876, for a nominal sum, to have assigned this large claim over to the present demandant. In all that interval, the public had been using this public place and it was not using it privately, it was not *clam*, but it was openly and as of right, without any interruption by the parties or any of them who are now represented to have had the property in the place. Mr. Fullarton relied very much on this action of Perrin's and a petition that came in from some outside parties. Who they were we do not know; but it was a petition which was not acted upon, and it is open to the suggestion that it was the existence of that petition that suggested the action of François Perrin. However, Perrin never took a step further, and it appears to their Lordships that the absence of any contestation of the right of the public to use this place as a public highway is clear evidence of acquiescence in the public right, or rather of abandonment of the claim, if any, that François Perrin had.

Their Lordships desire to point out that, independently of the statutes, there is evidence of a long-continued user by the public and an abandonment of right by those who could have disputed the user by the public, sufficient to sustain at common law the public right. There seems to be no difference between the law of Lower Canada and the law of England and of Scotland in that respect. The public had enjoyed

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the right from 1847 down to the commencement of the present action. They had enjoyed it openly, claimed it, not privately, but adversely, and as of right, and in the meantime, there had not been a single step on the part of the present claimant, or those from whom he derives title, to dispute that right, but, on the contrary, there was the amplest evidence of acquiescence in the public enjoyment. There has been made out, independently of any statutory provision, an ample case of user on the one side and dedication or abandonment on the other which would constitute the place in question a public place over which, not the citizens of Canada or Montreal alone, but the public at large, had rights, which the law would give effect to, independently of the provisions of any statute.

The 18 Vict., c. 100, Lower Canada, does not apply to Montreal, but deserves attention. Montreal is excepted from the operation of that Act, but it applies to every part of Lower Canada save Montreal and some other excepted places, and it contains this provision, that "every "road declared a public highway by any procès-verbal, by law or order "of any grand voyer, warden, commissioner or municipal council legally "made and in force when this Act shall commence shall be held to be a "road within the meaning of this Act until it be otherwise ordered by "competent authority." That was the Act adverted to by Chief Justice Dorion. He intended to refer to the 23 Vict., c. 72, which applies to Montreal alone. It deals with the property of Montreal. It deals with the powers of the corporation and extends them beyond the Act of the 8 Vict. In sub-section 6 of section 10 of that Act (23 Vict., c. 72) there is this special provision:— "The said council" (that is the council of Montreal) "shall also have power to cause such of the streets, lanes, "alleys, highways, and public squares in the said city, or any part or "parts thereof, as shall not have been heretofore recorded or sufficiently "described, or shall have been opened for public use during 10 years "but not recorded, to be ascertained, described, and entered of record "in a book to be kept for that purpose by the city surveyor of the said "city, and the same, when so entered of record, shall be public highways "or grounds; and the record thereof shall in all cases be held and taken "as evidence for their being such public highways and grounds."

Proceeding under this Act, the corporation did enregister the Place Jacques Cartier as a public place of the city. Their Lordships have no doubt that the registration was valid, and has been amply proved. If any objection had been taken at the trial before the Canadian Judge, it would have been the easiest thing possible to produce the original book, but a certified copy of the entry of registration was admitted in its place.

The Place Jacques Cartier had been from 1847 up to 1865 (more than 10 years before registration) enjoyed by the public as a public way, and it was enjoyed as a public way more than 10 years after the registration and before the present action was commenced; and it seems to

their Lordships that the case comes within the express language of that statute, and their Lordships have no doubt that, when the local Legislature passed this Act, they knew the state of things in the city, intended to provide for it, and did provide for it in strong and emphatic language, saying, that when a street or road should have been opened for public use during 10 years and placed upon the register, it should be a public highway.

Their Lordships are of opinion that, even if the common law question did not arise, still, there having been antecedent to this registration, and posterior to the registration, the statutable time during which the place should be used as a public street to give operation to the statute, the statute then applies, and upon that registration, the Place "Jacques Cartier" became a public highway. There is a distinction between the Canadian law and the law of this country as to public highways. The Canadian law agrees rather with the law of Scotland, which is founded on the civil law, namely, that when a street or road becomes a public highway, the soil of the road is vested in the Crown, if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then in that corporate body in trust for that public use. It was admitted in the argument for the appellant that such was the law of Lower Canada.

Their Lordships being of that opinion, which is in accordance with the principles deduced from *Guy* v. *Corporation of Montreal* (3 L. N. 402), and with the principles on which the Court of Queen's Bench for Lower Canada appears to have decided this case, will therefore humbly advise Her Majesty that the judgment of the Court of Queen's Bench for Lower Canada, which is also the judgment of the Superior Court, should be affirmed, and that the present appeal should be dismissed with costs.

Lacoste, Q. C., for the appellants.

R. Roy, Q. C., for the respondent.

Colonial Building & Investm't Associat'n & Attorney General.

PRIVY COUNCIL.

London, December 1, 1883.

Before LORD FITZGERALD, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, AND SIR ARTHUR HOBHOUSE.

THE COLONIAL BUILDING & INVESTMENT ASSOCIATION *v.* ATTORNEY GENERAL.

PER CURIAM. This is an appeal from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing a judgment of the Superior Court, which dismissed the petition of the Attorney General of the Province, praying that it be declared that the Appellant Company had been illegally incorporated, and that it be ordered to be dissolved, and prohibited from acting as a corporation.

The judgment now appealed from did not grant the prayer of the petition, but gave other relief, in the manner to be hereafter adverted to.

The Colonial Building and Investment Association was incorporated by an Act of the Parliament of Canada (37 Vict., c. 103). The preamble states—

> That the persons thereinafter named, 'owners of real estate in the city and 'district of Montreal, and elsewhere in the Dominion, have petitioned for an Act 'of Incorporation, to establish an Association to be called the Colonial Building 'and Investment Association, whereby powers may be conferred on the said Asso-'ciation for the purpose of buying, leasing, or selling landed property, buildings, 'and appurtenances thereof; for the purchase of building materials, to construct an 'improved class of villas, homesteads, cottages, and other buildings and premises, 'and to sell or let the same; and for the purpose of establishing a building or subs-'cription fund, to which persons may subscribe or pay in money for investment or 'for building purposes, and from which payments may be made for said purposes; 'and also to act as an agency.'

Sec. 1 incorporates the Association.

Sec. 2 enacts that the Association shall have power to acquire and hold, by purchase, lease, or other legal title, any real estate necessary for the carrying out of its undertakings; to construct and maintain houses or other buildings; to let, sell, convey, and dispose of the said property; to acquire and use or dispose of every description of materials for building purposes; to lend money on security, by mortgage or real estate, or on Dominion or Provincial Government securities; or on the stocks of chartered banks in the Dominion; and to acquire hold, and dispose of public securities, stocks, bonds, or debentures of any corporate bodies, and other defined securities. That clause provides that the Association shall sell the property so acquired within five years from the date of the purchase thereof.

Sec. 5 enables the Association to act as an agency and trust company.

Sec. 11 provides that the chief office of the Association shall be in the city of Montreal, and that branch offices or agencies may be established in London, England, in New York, in the United States of America, and in any city or town in

the Dominion of Canada, for such purposes as the Directors may determine, in accordance with the Act; and that bonds, coupons, dividends, or other payments of the Association may be made payable at any of the said offices or agencies.

Colonial Building & Investm't Associat'n & Attorney General.

The Secretary of the Association, the only witness called in support of the petition, proved that the Association had bought, lands, erected houses on such lands, and sold them, and had also built houses on the lands of others, and lent money on real estate. He stated that these operation had hitherto been confined to the province of Quebec, though efforts had been made to extend the business of the Company to other provinces, and to establish agencies in Glasgow and New York, which had failed in consequence of the inability of the Association to raise sufficient capital.

In order to understand the question which ultimately became the principal one to be considered in this Appeal, viz., whether the judgment of the Court of Queen's Bench is properly founded upon the Attorney General's petition, it is necessary to refer to the provisions of the Code of Civil Procedure of Lower Canada on which the proceedings are based, the scope and prayer of the petition, and the nature and form of the judgment appealed from.

The heading of Chapter 10, Section 1, of the Code is, "Of Corporations illegally formed, or violating or exceeding their powers."

Art. 997 is as follows:—

"In the following cases,—

"(1). Whenever any association or number of persons acts as a Corporation without being legally incorporated or recognized;

"(2.) Whenever any Corporation, public body, or board, violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its corporate rights, priveleges, and franchises, or exercises any power, franchise, or privilege which does not belong to it, or is not conferred upon it by law, it is the duty of Her Majesty's Attorney General for Lower Canada to prosecute in Her Majesty's name such violations of the law whenever he has good reason to believe that such facts can be established by proof in every case of public general interest, but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding; and in such case the special information must mention the names of the person who has solicited the Attorney General to take such legal proceedings, and of the person who has become security for costs."

Art. 998 (as amended) reads:—

"The summons for that purpose must be preceded by the presenting to the Superior Court, or to a Judge, of a special information containing conclusions adapted to the nature of the contravention and supported by affidavits to the satisfaction of the Court or Judge, and the writ of summons cannot issue upon such information without the authorization of the Court or Judge."

The material allegations of the petition filed by the Attorney General are the following:—

Colonial Building & Investm't Associat'n & Attorney General.

"That the 'Colonial Building and Investment Association' for the years past have been and still are acting as a Corporation in the City of Montreal, and elsewhere, in the Province of Quebec exclusively, and as such, ever since the date of its existence hereinafter mentioned, have been buying, leasing, and selling landed property, building, and appurtenances thereto, constructing villas, homestead, cottages, and other buildings, and selling and letting the same, and have also been lending money on security by mortgage or hypothec on real estate in this province, the whole without being legally incorporated or recognized.

"That the operations and business of the said Association have been limited to the Province of Quebec, and being, moreover, of a merely local or private nature in the said province, and having provincial objects affecting property and civil rights in the said province, the said Association could not lawfully be incorporated, except by or under the authority of the Legislature of the Province of Quebec.

"That the said Association was incorporated by the Parliament of Canada, in the year one thousand eight hundred and seventy-four, 37th Victoria, chapter 103, and has ever since been in operation under the said Act of Incorporation which, for reasons above alleged is null and void and of no effect, the said Act of incorporation being *ultra vires*.

"Wherefore your petitioner prays that a writ of summons upon the affidavit hereto annexed be ordered to issue in due course of law, and that the said Defendants be adjudged and declared to have been, and to be illegally formed and incorporated, and that the said illegal Association may be ordered to be dissolved, and be declared dissolved, and finally, that the Defendants be prohibited from acting in future as such Corporation, the whole with costs distraits to the undersigned attorneys."

The petition was verified by affidavit, as required by the Code, and thereupon an order for a writ of summons against the Company was issued by a judge.

The petition also alleges that it was presented at the solicitation of John Fletcher, a shareholder of the Company, who had become security for costs. It appears that Fletcher was in default in payment of his calls, but in the view their Lordship take of the case any further reference to this relator becomes immaterial.

The broad objection taken by the Attorney General in the petition is, that the Association was not legally incorporated, the statute incorporating it being *ultra vires* of the Parliament of the Dominion.

The judgment of the Superior Court, given by Mr. Justice Caron; distinctly overruled this objection. Mr. Justice Tessier is the only Judge of the Court of Queen's Bench who affirmed it. Chief Justice Dorion, in a judgment which received the concurrence of two other Judges, acknowledged that having regard to the observations of this Board in the case of *The Citizens Insurance Company of Canada v. Parsons* (L. R., 7 Appeal Cases, 96) it could not be held that the incorporation of the Association was beyond the powers of the Dominion Parliament, and illegal; and the majority of the Court gave judgment upon the assumption, as their Lordships understand the reasons of the Judges, that the Association was lawfully incorporated. The conclusion of the formal judgment of the Court is as follow:—

"The said Company, Respondents, had and have no right to act as a corporation for or in respect of any of the said opérations of buying, leasing, or selling of landed property, buildings, and appurtenances thereof, or the purchase of building materials to construct villas, homesteads, cottages, or other buildings and premises, or the selling or letting of the same, or the establishment of a building or subscription fund for investmen' or building purposes, or the acting as agents in counection with such operations as the aforesaid, or any like affairs, or any matter of property or civil rights, or any objects of a purely local or provincial nature in any manner or way within the said Province of Quebec, and doth prohibit the said Company Respondents. from acting as a Corporation within the said Province of Quebec for any of the ends or the purposes aforesaid."

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Mr. Justice Monk, in a short but clear judgment, dissented from his colleagues, and agreed with Mr. Justice Caron's judgment.

Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the Association was not lawfully incorporated. Although the observations of this Board in the *Insurance Company v. Parsons*, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of Companies.

It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the Association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the Provincial Legislature. But surely the fact that the Association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a Corporation, if the Act incorporating the Association was originally within the legislative power of the Dominion Parliament. The Company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a Corporation with those powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant prayed for, viz., that the Company be declared to be illegally constituted.

It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act.

Their Lordships therefore think that the Courts in Canada were right in holding that it was not competent to them to declare, in accordance with the prayer of the petition, that the Association was illegally incorporated, and ought to be dissolved.

There remains the question, which was mainly argued at the bar,

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whether the judgment of the Court of Queen's Bench which shortly stated, declares that the Association has no right to act as a Corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the province, can be sustained.

It was not disputed by the Counsel for the Attorney General that, on the assumption that the Corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the Company contravened the provincial law, at the least, in two respects, viz, in dealing in land, and in acting in contravention of the Building Acts of the province.

It may be granted that, by the law of Quebec, Corporations cannot acquire or hold lands without the consent of the Crown. This law was recognized by this Board, and held to apply to foreign Corporations in the case of the *Chaudière Gold Mining Company* v. *Desbarats* (L. R., 5 P. C. 277). It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within. No. 13 of Section 92 of the British North America Act, viz., Property and Civil Rights within the Province," and belongs exclusively to the Provincial Legislature ; so that the Dominion Parliament could not confer powers on the Company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit Corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a Corporation does not infringe the provincial law of mortmain by acquiring and holding lands. What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are define within a defined area, viz, throughout the Dominion. Among other things, it has given to the Association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the Company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

It is said, however, that the Company has, in fact, violated the law of the province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation by a Corporation of the mortmain laws would involve an inquiry opening questions (some of which were touched upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage

of it; questions which are certainly not raised by the allegations and conclusions of this petition.

So with respect to the objections founded on the Acts of the Province with regard to building societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the Legislature of the Province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present Association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of those Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the Association in question.

If the Association by its operations has really infringed the Provincial Building Societies Acts, a proper remedy may doubtless be found, adapted to such a violation of the provincial law; but, as their Lordships have just observed, with reference to the supposed contravention of the mortmain Acts, that is not the case made by the petition.

It now becomes material to examine more closely than has hitherto been done the allegations and conclusions the petition really contains.

The first paragraph, after stating that the Corporation carried on its operations in Quebec exclusively, concludes thus: "the whole without "being legally incorporated or recognized."

The 2nd paragraph avers that the operations of the Company being confined to Quebec, and being of a merely local nature, affecting property and civil rights in the province, "could not lawfully be incorporated except by the authority of the Legislature of the province."

The 3rd paragraph alleges that, for these reasons, "the Act of Incorporation is null and void, the said Act of Incorporation being *ultra* "*vires*."

The conclusion and prayer based on these allegations are, that the Association be declared to be illegally incorporated, be declared dissolved, and prohibited from acting in future as a Corporation.

It seems to their Lordships it would be a violation not only of the ordinary rules of procedure, but of fair trial, to decide this appeal upon a new case which, assuming a lawful incorporation. rests on the supposed infringement of the laws of the province by the Company in conducting its operations. This is not the wrong struck at by the petition, but a wrong-doing raising issues of a wholly different character to those to which the allegations and conclusions of the petition are alone directed and adapted. It is to be observed that the inquiries made of the Company's Secretary were a general nature, and mainly directed to support the allegation in the petition that the Company's operations had been limited to the Province of Quebec. No investigation of the title to any of the lands it held, nor of any particular transaction, was gone into at the hearing.

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The 998th article of the Code of Civil Procedure requires that the summons to be issued "must" be preceded by a petition to the Court containing "conclusions adapted to the "nature of the contravention," to be supported by an affidavit; and provides that the summons cannot be issued upon such information without the authority of a Judge. It is quite plain that the conclusions of this petition are not adapted to the case now relied on by the Attorney General; so that neither the general principle regulating procedure nor the special requirements of the Code allow of its being set up on these proceedings.

If the Company is really holding property in Quebec without having complied with the law of that province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violation; though it is not for their Lordships to anticipate them, or to indicate their form.

It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the Citizens Insurance Company, in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a Corporation could only exercise its powers subject to the law of the province, whatever it might be, in this respect.

It was argued that the judgment of the Court of Queen's Bench might be sustained by the part of the prayer which asked that the Company "be prohibited from acting in future as a Corporation within the "Province of Quebec" for certain purposes. But the prohibition is asked as consequential upon the declarations prayed for, and when these are refused, there are not only no declarations, but no allegations in the petition to sustain it. It has been seen that the prohibition contained in the judgment of the Court of Queen's Bench is not an injunction limited to restraining the Company from doing specified acts in violation of particular laws of the province, but is a general prohition founded on a declaration introduced by the Court, other than those prayed for, that the Company has no right to act as a Corporation in dealing with lands and buildings, and certain other matters within the province. This declaration, with the prohibition fonnded on it, is obviously too extensive. A prohibition in these wide and sweeping terms would prohibit the Company from acquiring or dealing in lands, though it had the Crown's consent, and could only be warranted by affirming the invalidity of the Act of Incorporation, which would be opposed to what has been stated in the previous part of this judgment to be their Lordships' view; or at least by affirming that the Company, in exercising its powers in the province, must necessarily violate the provincial law, which as already shown, is not a necessary consequence.

In the result, their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, and to order that the judgment of the Superior Court be affirmed, and that the present Appellant's costs of the appeal to the Court of Queen's Bench in Canada be paid by the present Respondent. The Appellant must also have the costs of the appeal to Her Majesty. Colonial Building & Investm't Ass'ociat'n & Attorney General.

Judgment reversed.

Henry Mathews, Q. C., W. W. Robertson, Q. C., (of the Quebec bar), and *McLeod Fullarton* for the appellants.

Gibbs, Q. C., Girouard Q. C., (of the Quebec bar) and *Tudor Bodham* for the respondent.

PRIVY COUNCIL, 1880.

London, Eng., 15th April, 1880. Cushing & Dupuy.

Coram: Sir James W. Colville, L. J., Sir Barnes Peacock, L. J., Sir Montague E. Smith, L. J., Sir Robert P. Collier, L. J.

CUSHING *v.* DUPUY.

This appeal is from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing the judgment of a judge of the Superior Court, which had been given in the appellant's favour, in certain proceedings in insolvency instituted under an Act of Parliament of the Dominion of Canada, intituled "An Act respecting Insolvency" (38 Vict., c. 16).

These proceedings were commenced by a petition of Mr. Cushing, the appellant, to the Superior Court, praying that Mr. Dupuy, the official assignee of the estate of the insolvent firm of McLeod, McNaughten and Léveillé, might be ordered to deliver up certain property seized by him, as such assignee, under a writ of attachment, on the ground that it had been sold to the petitioner by the insolvents before their insolvency.

An application to the Court of Queen's Bench for leave to appeal to Her Majesty in Council was refused, on the ground that, under the Insolvency Act, its judgment was final. The appellant then presented a petition to Her Majesty for special leave to appeal, which Her Majesty was advised by their Lordships to grant, reserving to the respondent power to raise at the hearing the question of Her jurisdiction to entertain the appeal.

That question, which has been fully argued at the Bar, raises two points; first, whether the Court of Queen's Bench was right in holding that the appeal to Her Majesty in Council, given *de jure* by Art. 1178 of the Code of Civil Procedure, from final judgments rendered to appeal by that Court, is taken away by the Insolvency Act; and, secondly, if that

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be so, whether the power of the Crown, by virtue of its prerogative, to admit the appeal is affected by that Act.

The 128th section of the Insolvency Act enacts as follows:—

"In the Province of Quebec all decisions by a judge in chambers in matters of insolvency shall be considered as judgments of the Superior Court; and any final order or judgment rendered by such Judge or Court may be inscribed for revision, or may be appealed from by the parties aggrieved, in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases under the laws in force when such decision shall be rendered."

By the 28th section of a subsequent Act of Parliament of Canada, 40 Vict., c. 41, it is enacted that the 128th section of the former Act shall be amended by adding thereto the following words:—

"The judgment of the Court to which, under this section, the appeal can be made shall be final."

This Court, in the Province of Quebec, is the Court of Queen's Bench.

The whole question turns on these added words, and in considering their effect on the right of appeal to the Crown given *de jure* by the Code, two things are to be regarded; (1), the power of the Dominion Parliament to abrogate this right; and (2), if it had the power, whether it intended to exercise it.

The first of these questions depends upon the construction of the British North American Act, 1867, which confers and distributes legislative powers. By section 91 of that Act, exclusive legislative authority in certain matters is conferred upon the Parliament of Canada, and by section 92 exclusive authority in certain others upon the Provincial Legislatures.

Section 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and, for greater certainly, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"21. Bankruptcy and Insolvency."

Section 92 enacts,—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

"13. Property and civil rights.

"14. The administration of justice in the Province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It was contended for the appellant that the provision of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province.

The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of Bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by Art. 1178 of the Code of Civil Procedure. Nor, in their Lordships' opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the Province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion Act creates. Such a provision in no way trenches on the Royal prerogative.

Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38 Vict., c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench

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to the Queen to remain. Besides the word "final" has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (*See* the Lower Canada Statute, 34 Geo. 3, c. 30.)Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question of limit the meaning of the word. For these reasons their Lordships think that the Judges below were right in holding that they had no power to grant leave to appeal.

The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is in their Lordship's view unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative, since the 28th section of the Insolveney Act does not profess to touch it, and they think, upon the general principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuvillier* vs. *Aylwin* (2 Knapp's P. C. 72) which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

The question in *Cuvillier* vs. *Aylwin* arose upon the Lower Canada Colonial Act, 34 Geo. 3, c. 6, which enacted that the judgment of the Court of Appeals should be final in all cases under the value of 500*l*., and an application for special leave to appeal in a case under that value was refused by a Committee of the Privy Council. The remarks attributed to the Master of the Rolls in his judgment rejecting the petition are directed to one aspect only of the question, viz., the power of the Crown with the other branches of the Legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decision are opposed to it.

In re Louis Marois (reported in 15 Moore, P. C. 189), upon an application for leave to appeal from a judgment of the Court of Queen's Bench for Lower Canada, Lord Chelmsford, in giving the judgment of this Committee, after stating that in *Cuvillier* vs. *Aylwin* the very point was decided against the petitioner, said :—

"If the question is to be concluded by that decision, the petition must be at once dismissed, but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration whiche the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines; and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown."

Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their Lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuvillier* vs. *Aylwin* could be sustained or not, it is obvious that, at the least, they regarded it as being open to review. Cushing & Dupuy.

In *Johnston* v. *The Minister and Trustees of St. Andrew's Church* (L. R. 3 Appeal Cases 159), upon an application for special leave to appeal against a judgment of the Supreme Court of Canada, the effect of the 47th section of the Act, establishing that Court, whhich enacted that its judgments should be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the Lord Chancellor, in giving the judgment of this Committee, said :—

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section."

Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuvillier* vs. *Aylwin*, where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the Crown.

Another case lately before this Committee requires consideration, Theberge and another vs. Landry (L. R. 2 Appeal Cases, 102). It was an application for special leave to appeal against a judgment of the Superior Court of Quebec upon an election petition, by which the applicant had been unseated for corrupt practices. By the Quebec Controverted Elections Act, 1875, the decision of controverted elections, which formely belonged to the Legislative Assembly itself, was conferred upon the Superior Court, and by Section 90 of the Act is was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Superior Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of peculiarity of the subject matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as partaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen in Council. But, whilst coming to this

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decision, the Lord Chancellor, in giving the judgment of the Committee, affirmed the general principle as to the prerogative of the Crown:—

"Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away, except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

It was not suggested that an appeal would not have laid to the Queen in Council under the Insolvency Act of 1875; and it was not until two years afterwards that the Amending Act of 1877, which is said to have taken it away, was passed.

The learned Counsel for the appellant drew attention to the Act of the Parliament of Canada, 31 Vict., c. 1, which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or the context.

Sub-section 33 of section 7 of that Act is as follows:—

"No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs, or successors, unless it is expressly stated that Her Majesty shall be bound thereby."

The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmance of the general principle of law already adverted to.

Applying that principle to the enactment in question, their Lordships are of opinion that, as it contains no words which purport to derogate from the prerogative of the Queen to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, Her authority in that respect is unaffected by it.

The order for leave to appeal granted in the present case will consequently stand.

Upon the merits of the appeal the following are the principal facts:—Messrs. McLeod, McNaughton and Léveillé, who carried on business as brewers in Montreal, became insolvent on the 19th July, 1877, and on the same day their estate and effects, including the plant, material and effects which are the subject of these proceedings, were seized by the respondent, as official assignee under a writ of attachment in insolvency. Thereupon the appellant, who is a notary, demanded from the assignee the delivery of the above-mentioned plant and effects, on the ground that they had been sold to him by the insolvents on the 14th March, 1877, about four months before the insolvency. He claims them as owner under a contract of sale, in the petition which gives rise to this appeal.

The contract on which the appellant relies is contained in a notarial instrument, by which the insolvents purport to bargain, sell and assign to the appellant the plant, material, furniture and effects (described in

detail in the bill of sale) lying and being in and about their brewery. Some of these effects are valued in the bill of sale, the total of these values amounting to $4,800; others are not valued. The consideration is thus stated in the deed :—

" The present bargain and sale is made in manner aforesaid, for and in consideration of the sum of one dollar currency, cash in hand, paid at the execution hereof, and for other good and valuable consideration heretofore had and received, the receipt whereof is hereby acknowledged, whereof quit, and in further consideration that the said purchaser shall endorse the paper of the firm of McLeod, McNaughton and Léveillé, which he agrees to do on demand, for a sum which, together with present unsecured endorsements, shall not exceed in all two thousand dollars."

Authority is given to the appellant by the deed to take possession of the effects.

On the same day a lease was made by the appellant to the insolvents of the same plant and effects for three years at a yearly rent of $100.

The petition of the appellant alleges that he took possession of the effects, but in fact no removal or change of possession whatever took place, and the plant and effects remained in the possession of the insolvents, precisely as before, up to the time of their insolvency. All that the petitioner in his evidence states with regard to possession is, that he went over the effects, and verified their existence.

The general question was raised, and much discussed in the Courts below, whether delivery or déplacemeni of the thing sold was necessary to pass the property in it. It was contended that the Canadien law which required déplacement had been altered in this respect by the Canadian Civil Code, as the French law had been by the Code Napoléon.

Art. 1472 of the Canadian Code is as follows :—

" Sale is a contract by which one party gives a thing to another for a price in money, which the latter obliges himself to pay for it. It is perfected by the consent alone of the parties, although the thing sold be not then delivered, subject nevertheless to the provisions contained in Article 1027."

Art. 1025 was also referred to.

Art. 1027 is as follows :—

" The rules contained in the two last preceeding Articles apply as well to third persons as to the contracting parties, subject, in contracts for the transfer of immoveable property, to the special conditions contained in the Code for the registration of titles to and claims upon such property. But if a party oblige himself successively to two persons to deliver to each of them a thing which is purely moveable property, that one of the two who has been put in actual possession is preferred, and remains owner of the things, although his title be posterior in date ; provided, however, that his possession be in good faith."

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The question was debated in the Courts below whether, under the law established by these Articles, déplacement or a change of possession was not still necessary to give the petitioner a title against the assignee in insolvency. Their Lordships, however, do not feel it necessary to determine this question, because, allowing the appellant's construction of these Articles the fullest extent, and assuming for the purpose of the present decision that, upon a genuine contract of sale, the property sold would pass to the vendee, as regards not only the vendor, but third persons, without delivery or déplacement, they agree with the opinion of Chief Justice Dorion (in which Justices Cross and Tessier concurred) that the transaction in question was not a genuine but a simulated sale, and, if at all real, was a contrivance intended to obtain, under colour of a sale, a security upon the plant and effects, and thus to avoid the delivery of possession which is essential to the validity of a pledge. (*See*, as to pledge, Arts. 1966-1970, Canadian Civil Code.)

In examining the character of the transaction, it is in the first place to be observed that the alleged sale was not for a price in money, nor for anything equivalent to money; nor was the consideration fixed and certain, but wholley indeterminate, the amount depending on future contingencies. The considerations expressed in the instrument are, (1) one dollar, which of course is merely a nominal, and not a serious part of the consideration; (2) "other good and valuable consideration heretofore had and received;" the nature and amount being both unexpressed, and (3) what appears to be the real consideration, viz, that the vendee should endorse the paper of the firm, which he agreed to do on demand, for a sum which, together with present unsecured endorsements, should not exceed in all 2,000 dollars. This agreement of the appellant to give his endorsements by way of accommodation to the firm is obviously a consideration of an indeterminate character. Suppose he refused to give them, the remedy would be an action for breach of the agreement, in which the damages would be uncertain. Again, he does not bind himself to pay the bills he may endorse, and the holders might in the first instance choose to sue the firm. The ultimate extent of the liability on the agreement to indorse is plainly uncertain. This vague and contingent liability contains none of the elements of a fixed price, which is one of the essential incidents of the contract of sale. (*See* Pothier, Traité du Contrat de Vente, Part I., Sec. 2, Art. 2, secs. 1, 2, 3.)

But, however inconsistent the consideration expressed in the bill of sale may be with the idea of a sale, it would be fit and sufficient to support a contract of pledge for securing the appellant against loss arising from his endorsements of the paper of the firm; and that this, if it were at all real, was the nature and object of the transaction, is shown by other circumstances attending it. The value of some of the effects (for what reason does not appear) is stated in the deed, and this value alone amounts to $4,800. The rest is not valued, but obviously

must have been of substantial value. It is scarcely to be supposed that all these effects would have been absolutely sold to the appellant for a contingent consideration which could not exceed $2,000.

Then, on the same day, the whole of the effects are leased to the insolvents for a yearly rent of $100. As the Chief Justice points out, this rent would return the supposed owner of the plant and stock 1½ or 2½ per cent, only upon their value, whilst these implements would come back to him at the end of the term deteriorated by wear and tear. Such a rent he considers to be illusory. Under colour of this lease the insolvents were able to retain the plant and carry on their business as usual.

It is to be observed that a transaction which presents on the face of the documents so anomalous a character has received no extraneous support or explanation. The appellant gave no evidence of any antecedent consideration, or of the extent of his endorsements of the paper of the firm, or of any circumstances to explain the alleged purchase.

It is scarcely necessary for their Lordships to say that, supposing (as they have assumed) the law to be that the property in the thing sold passes by a genuine contract of sale without delivery, even as against third persons, yet the circumstance of there being no change of possession must still be one of the material facts to be regarded in determining the question whether any particular sale is real or simulated.

In the present case their Lordships, for the reasons they have stated, agree with the majority of the Judges of the Court of Queen's Bench in their conclusion that, whatever may be the real nature of the transaction in question, it has not the indicia of a *bonâ fide* sale.

They will, therefore, humbly advise Her Majesty to affirm the judgment appealed from, and with costs.

Judgment of Court of Q. B. confirmed.

(S. B.)

Dobie & Board for the management of the temporalities fund of the Presbyterian Church of Canada in connecti'n with the Church of Scotland

PRIVY COUNCIL, 1882.

Montreal, 21st January, 1882.

Coram LORD BLACKBURN, LORD WATSON, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER. SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

THE REV. ROBERT DOBIE *v.* BOARD FOR THE MANAGEMENT OF THE TEMPORALITIES FUND OF THE PRESBYTERIAN CHURCH OF CANADA IN CONNECTION WITH THE CHURCH OF SCOTLAND, ET AL.

The first question raised in this appeal is, whether the Legislature of the Province of Quebec had power, in the year 1875, to modify or repeal the enactments of a statute passed by the Parliament of the Province of Canada in the year 1858 (22 Vict., cap. 66), intituled "An Act "to incorporate the Board for the Management of the temporalities "Fund of the Presbyterian Church of Canada in connection with the "Church of Scotland."

The fund subject to the administration of the Board constituted by the Act of 1858 consisted of a capital sum of £127,448 5s. sterling, which was paid by the Government of Canada under the following circumstances: The ministers of the Presbyterian Church of Canada in connection with the Church of Scotland were entitled, by virtue of certain Imperial statutes, to an endowment or annual subsidy out of the revenues derived from colonial lands, termed clergy reserves, and from moneys obtained by the sale of portions of those lands, supplemented, when necessary, from the Exchequer of Great Britain. But this connection betwen the Presbyterian Church and the State was at length dissolved. In 1853, an Act was passed by the British Parliament (16 Vict., cap. 21), authorizing the Legislature of the Province of Canada to dispose of the clergy reserves, and investments arising from sales thereof, but reserving to the clergy the annual stipends then enjoyed by them, and that during the period of their natural lives or incumbencies. In 1855, the Legislature of Canada, in exercise of the power thus conferred, enacted that all union betwen Church and State should cease, and that those ministers who were admitted to office after the 9th May, 1853, being the date of the Act, 16 Vict., cap. 21, should receive no allowance from the Government. It was, however, provided that the rights of ministers entitled, at that date, to participate in the State subsidy, should be reserved entire, power being given to the Governor-General-in-Council to commute the annual stipend payable to each individual so entitled for the capital value of each stipend, calculated at six per cent. on the probable life of the annuitant.

All the ministers interested consented to accept the statutory terms of commutation, and agreed to bring the amounts severally

payable to them into one common fund, to be settled for behoof of the Presbyterian Church of Canada in connection with the Church of Scotland. In accordance with resolutions unanimously adopted by the Church in Synod assembled on the 11th January, 1855, they further agreed that the interest of the fund should be devoted, in the first instance, to the payment of an annual stipend of £112 10s., to such commutor, and that the claim next in order of preference should be that of ministers then on the roll, who had been admitted since the 9th May, 1853. The arrangement thus effected was carried out by eight Commissioners duly appointed for that purpose, of whom three were ministers and five were laymen. They received payment of the commutation moneys, to the amount already stated; and in order to provide for the management of the fund thus obtained, the Legislature of the Province of Canada, upon the application of the Commissioners, passed the Act 22 Vict., cap. 66.

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By the first clause of the Act in question, the Commissioners were, along with four additional members and their successors, declared to be a body politic and corporate, by the name of the "Board for the "Management of the Temporalities Fund of the Presbyterian Church "of Canada in connection with the Church of Scotland; and the funds "held by them as Commissioners were vested in the Board "in trust "for the said Church," subject to the condition that the annual interest thereof should remain chargeable with the stipends and allowances payable to the parties entitled thereto, in terms of the arrangement under which the fund was contributed by the commutors. It was enacted that, at the first meeting of Synod held after the passing of the Act, three Commissioners, one minister and two laymen, should retire from the Board, and that seven new members, consisting of four ministers and three laymen, should be elected by the Synod. The Board thus reconstituted was composed of six ministers and six laymen, and it was provided that at each annual meeting of the Synod held thereafter two ministers and two laymen were to retire by rotation, and that four new members, two clerical and two lay, should be elected in their stead. It was expressly enacted that all members of the Board should also be members of the Presbyterian Church of Canada in connection with the Church of Scotland; and provision was made for filling up vacancies occasioned by the death or resignation of a member, by his removal from the Province of Canada, or by his leaving the communion of the said Church.

In the year 1874, serious proposals had been made for an incorporation union between the Presbyterian Church of Canada in connection with the Church of Scotland, the Canada Presbyterian Church, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces. The old Parliament of the Province of Canada had by this time been abol-

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ished, and its legislative power had been distributed between the two Provincial Legislatures of Ontario and Quebec, and the new Parliament of the Dominion of Canada, under the provisions of the "British North America Act, 1867." With the view of facilating the contemplated union of the Churches, an act of the Legislature of Quebec was passed in February, 1875, (38 Vict,, cap. 62), in order to remove any obstruction which might arise from the form and designation of the several trusts or acts of incorporation by which the property of the Churches was held and administered. By the 11th section of that Act it was provided that, in the event of union taking place, the members then constituting the Board for management of the Temporalities Fund, under the Act of 1858, should remain in office, and pay over the revenue to the persons previously entitled to it; that any revenue not required for that purpose should pass to and be subject to the disposal of the United Church; and that any part of the fund remaining after satisfying the claim of the last survivor of those entitled should belong to the Supreme Court of the United Church, and be applied to the aid of weak congregations. It was by the same clause enacted that vacancies occurring in the Temporalities Fund Board should not be filled up in the manner theretofore observed, but should be filled up in the manner provided by another Act of the Quebec Legislature.

This last-mentioned statute (38 Vict., cap. 64), which received the assent af the Governor-General-in-Council upon the same day as the preceding, was passed with the professed object of amending the Act of the Parliament of the Province of Canada, 22 Vict., cap. 66. It was thereby enacted that, from the time when the union was effected, the annual allowances to which they were previously entitled were to be continued by the Temporalities Board to ministers and probationers then on the roll of the Presbyterian Church of Canada in connection with the Church of Scotland, and these were to be paid, so far as necessary, out of the capital of the fund, and that any surplus of revenue or capital, after satisfying thse charges, should be at the disposal of the United Chuch. Ministers and probationers of the Church, interested in the Temporalities Fund, who might decline to become parties to the union, were, however, to retain all rights previously competent to them until the same lapsed or were extinguished. The constitution of the Board of Management was altered by the third and eighth clauses of the Act. The third clause is in these terms :—"As often as any vacancy "in the Board for the management of the said Temporalities Fund "occurs, by death, resignation, or otherwise, the beneficiaries entitled "to the benefit of the said fund may each nominate a person, being a "minister or member of the said United Church, or, in the event of "there being more than one vacancy, then one person for each vacancy, "and the remanent members of the said Board shall thereupon, from "among the persons so nominated as aforesaid, elect the person or

" number of persons necessary to fill such vacancy or vacancies, select-
" ing the person or persons who may be nominated by the largest num-
" ber of beneficiaries, but, in the event of failure on the part of the
" beneficiaries to nominate as aforesaid, the remanent members of the
" Board shall fill up the vacancy or vacancies from among the minis-
" ters or members of the said United Church." The eighth clause enacts that the 3rd section shall continue in force until the number of beneficiaries is reduced below fifteen, upon which occurrence the Board is to be continued by the remanent members filling up vacancies from among the ministers or members of the United Church. By the 10th section it was declared that the Act should come in force as soon as a notice was published in the Quebec *Official Gazette* to the effect that the union had been consummated, and that the articles of union had been signed by the Moderators of the respective Churches.

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On the 14th day of June, 1875, the Synods of the four churches met at Montreal, and in each a resolution was carried in favor of union. In the Synod of the Presbyterian Church of Canada in connection wifh the Church of Scotland it was resolved, by a very large majority of its members, that the four Churches should be united, and form one Assembly, to be known as " The General Assembly of the Presbyterian Church in Canada," and that the united Churches should possess the same authorities, rights, privileges and benefits to which the Presbyterian Church in Canada in connection with the Church of Scotland was then entitled, excepting such as had been reserved by Acts of Parliament. The minority, which consisted of the appellant, the Rev. Robert Dobie, and nine other members, dissented from the action of the Synod, and that they, and those who might choose to adhere to them, remained and still constituted the Presbyterian Church of Canada in connection with the Church of Scotland.

On the 15th June, 1875, the majority of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, and the Synods of the other uniting Churches, met in General Assembly, when the Articles of Union were signed by the Moderators of each of the four Churches ; and thereupon one of the Moderators, with the consent and concurrence of the rest, declared the four churches to be united in one Church, represented by that its first General Assembly, to be designated and known as " The General Assembly of the Presbyterian Church in Canada." Notice of the union having been thus consummated was duly published in the Quebec *Official Gazette.*

After publication of the notice, the constitution of the Board for managing the Temporalities Fund was altered, and the Fund administered in conformity with the provisions of the Quebec Act, 38 Vict., cap. 64. In December, 1878, the Rev. Robert Dobie, who, with other members of the protesting minority of 1875 and their adherents, maintains that they alone represent and constitute the Presbyterian Church of Canada

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in connection with the Church of Scotland, instituted, by petition to the Superior Court for Lower Canada, the proceedings in which the present appeal has been taken. The leading conclusions of the petition are to have it adjuged and declared, (1) that the Legislature of Quebec had no power to alter the constitution of the Board or the purposes of the trust created by the Canadian Act, 22 Vict., cap. 61, and consequently that the administration of the trust as carried on in terms of the Provincial Act of 1875 is illegal; (2) that the protesting minority of the Synod of 1875, and its adherents, are now the Presbyterian Church of Canada in connection with the Church of Scotland, and that certain ministers of the United Church, who were members of the majority, had, by reason of the union, forfeited all right to participate in the benefits of the Temporalities Fund; and (3) to have an injunction against the Board, as then constituted, acting in prejudice of the rights of the appellant, and others beneficially interested in the statutory trust of 1858. Upon the 31st of December, 1878, the appellant's application was heard before Mr. Justice Jetté, who made an order for summoning the respondents, and also issued an *interim* injunction, which the learned judge dissolved. after fully hearing both parties, en the 31st of December, 1879, and at the same time dismissed the appellant's petition, with costs. The decision was, on appeal to the Court of Queen's Bench for Lower Canada, affirmed, in accordance with the opinions of the majority of the Judges.

The judgments of Mr. Justice Jetté in the Court of the first instance, and of Chief Justice Dorion and Mr. Justice Monk in the Court of Queen's Bench, are based exclusively upon the competency of the Quebec Legislature to pass the Act 38 Vic., cap. 14, and the consequent validity of that statute. On the other hand, Mr. Justice Ramsay and Mr. Justice Tessier were of opinion that the appellant was entitled to an injunction, on the ground that the Act 38 Vict., cap. 64, was invalid, and that the majority of the Presbyterian Church of Canada in connection with the Church of Scotland had no power to communicate any interest in the Temporalities Fund of that Church to the religious bodies with whom they had chosen to unite themselves in 1875. Mr. Justice McCord was of opinion, with his brethren Ramsay and Tessier, JJ., that the Act of the Legislature of Quebec was *ultra vires*, but he held that the majority of the Presbyterian Church of Canada in connection with the Church of Scotland had undoubted power to admit into that Church as members of it, the three religious bodies with whom they had entered into union. Consequently the learned Justice, though differing in opinion from his brethren Dorion, C. J. and Monk, J., agreed with them in result.

Whether the Legislature of Quebec had power to pass the Act 38 Vict., cap. 64, is the question first requiring consideration, because, if it be answered in the affirmative, the case of the appellant entirely fails

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The determination of that question appears to their Lordships to depend upon the construction of certain clauses in the British North America Act, 1867. There is no room, in the present case for the application of those general principles of constitutional law which were discussed by some of the Judges of the Courts below, and which were founded on in argument at the bar. There is really no practical limit to the authority of a supreme legislature except the lack of executive power to enforce its enactments. But the Legislature of Quebec is not supreme; at all events, it can only assert to supremacy within those limits which have been assigned to it by the Act of 1867.

The Act of Parliament of the Province of Canada, 22 Vict., cap. 66, was, after the passing of the British North America Act, 1867, continued in force within the Provinces of Ontario and Quebec, by virtue of section 129 of the latter statute, which, *inter alia*, enacts that, except as therein otherwise provided, all laws in force in Canada at the time of the union thereby affected shall continue in Ontario and Quebec as if the union had not been made; but the enactment is qualified by the provision that all such laws, with the exception of those enacted by the Parliament of Great Britain, or of the United Kingdom of Great Britain and Ireland, shall be subject "to be repealed, abolished, or altered by the "Parliament of Canada, or by the Legislature of the respective Province, "according to the authority of the Parliament or of that Legislature "under this Act." The powers, conferred by this section upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of the Province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act 1867. In order, therefore, to ascertain how far the Provincial Legislature of Quebec had power to alter and amend the Act of 1858, incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sections 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of Parliament of Canada, as well as those in relation to which the Legislatures of the respective Provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject, the Legislature of Quebec would have have been authorized by section 92 to pass an Act in terms identical with the 22 Vict., cap. 66, then it would follow that the Act of the 22nd Vict., has been validly amended by the 38 Vict., cap. 64. On the other hand, if the Legislature of Quebec has not derived such power of enactment from section 92, the necessary inference is that the legislative authority required, in terms of section 129, to sustais its right to repeal or alter an old law of the Parliament of the Province of Canada, is in this case wanting, and that the Act 38 Vict., cap. 64, was not *intra vires* of the Legislature by which it was passed.

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The general scheme of the British North America Act, 1866, and, in particular, the general scope and effect of sections 91 and 92, have been so fully commented upon by this Board in the recent cases of "the Citizens Insurance Company of Canada vs. Parsons," and "the Queen Insurance Company vs. Parsons," that it is unnecessary to say anything further upon the subject. Their Lordships see no reason to modify in any respect the principles of law upon which they proceeded in deciding these cases; but in determining how far these principles apply to the present case, it is necessary to consider to what extent the circumstances of each case are identical or similar.

The case of "The Citizens Insurance Company of Canada vs. Parsons comes nearest in its circumstances to the present, as in that case the appellant company was incorporated by, and derived all its statutory rights and privileges from an Act of the Province of Canada, whereas, "The Queen Insurance Company" was incorporated under the provisions of the British Joint Stock Companies Act, 7 and 8 Vict., cap. 110. In both cases the validity of an Act of the Legislature of Ontario was impeached on the ground that its provisions were *ultra vires* of a provincial Legislature, and were not binding unless enacted by the Parliament of Canada. It was contended on behalf of the Citizens Insurance Company that the statute complained of was invalid in respect that it virtually repealed certain rights and privileges which they enjoyed by virtue of their Act of incorporation. That contention was rejected, and the decision in that case would be a precedent fatal to the contention of the appellant, if the provisions of the Ontario Act, 39 Vict., cap. 31, and the Quebec Act, 38 Vict., chap. 64, were of the same or substantially the same character. But upon an examination of these two statutes, it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy, entered into or in force, for insuring property situate within the Province against the risk or fire. It dealt with all corporations, companies and individuals alike who might choose to insure property in Ontario,—it did not interfere with their constitution or *status*, but required that certain reasonable conditions should be held as inserted to every contract made by them. The Quebec Act, 38 Vict., cap 64, on the contrary, deals with a single statutory trust, and interferes directly with the constitution and privileges of a corporation created by an Act of the Province of Canada, and having its corporate existence and corporate rights in the Province of Ontario, as well in the Province of Quebec. The professed object of the Act and the effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the Province of Quebec, but to destroy, in the first place, the old corporation, and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation.

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According to the principles established by the judgment of this Board in the cases already referred to, the first step to be taken, with a view to test the validity of an Act of the Provincial Legislature, is to consider whether the subject matter of the Act falls within any of the classes of subjects enumerated in sec. 92. If it does not, then the Act is of no validity. If it does, then these further questions may arise, viz., "whether, notwithstanding that it is so, the subject of the Act does not "also fall within one of the enumerated classes of subjects in sec 91, "and whether the power of the Provincial Legislature ie or is not thereby "overborne."

Does then the Act 38 Viet., c. 64, fall within any of the classes enumerated in sec. 92, and thereby assigned to the Provincial Legislatures ? Their Lordships are of opinion that it does not ; and consequently that its enactment are invalid, and that the constitution and duties of the Board for managing the Temporalities Fund must still be regulated by the Act of 1858.

It was contended for the respondents chat the Quebec Act of 1875 is within one or more of these three classes of subjects enumerated in sec. 92,—

"(7). The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province other than the marine hospitals."

"(11). The incorporation of companies with provincial objects."

"(13). Property and civil rights in the Province."

The most plausible argument for the respondent was founded upon the terms of Class (13), but it has failed to satisfy their Lordships that the statute impeached by the appellant is a law in relation to property and civil rights within the Province of Quebec.

The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property, or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec, respectively, the Legislature of each Province would have power to deal with them so far as situate within the limits of its authority. If, by a single Act of the Dominion Parliament, there had been constituted two separate corporations, for the purpose of working,, the one a mine within the Province of Upper Canada, and the other a mine in the Province of Lower Canada, the Legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked.

The Quebec Act 38 Vict., cap. 64, does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the Province of Quebec, and its enactments are apparently not framed with a view to any such limitation. The reason is

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obvious, and it is a reason which appear to their Lordships to be fatal to the validity of the Act. The corporation and the corporate trust, the matter to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an Act applicable to the two Provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other Province. But, in the present case, the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the Province of Ontario, as well as the rights and interests of individual corporators in that Province. In addition to that, the fund administered by the corporate Board, under the Act of 1858, is held in perpetuity for the benefit of the ministers and members of a Church having its local situation in both Provinces, and the proportion of the fund and its revenues falling to either Province is uncertain and fluctuating, so that it would be impossible for the Legislature of Quebec to appropriate a definite share of the corporate funds to their own Province without trenching on the rights of the corporation in Ontario.

These observations regarding Class (13) apply with equal force to the argument of the respondents founded on Classes (7) and (11). Even assuming that the Temporalities Fund might be correctly described as a "charity" or as an "eleemosynary institution," it is not in any sense established, maintained, or managed "in or for" the Province of Quebec: and if the Board, incorporated by the Act 1858, could be held to be a "company" within the meaning of Class (11) its objects are certainly not provincial.

The respondents further maintained that the Legislature of Quebec had power to pass the Act of 1875, in respect of these special circumstances, (1) that the domicile and principal office of the Temporalities Board is in the city of Montreal; and (2) that its funds also are held or invested within the Province of Quebec. These facts are admitted on record by the appellant, but they do not affect the question of legislative power. The domicile of the corporation is merely forensic, and cannot alter its statutory constitution as a Board in and for the Provinces of Upper Canada and Lower Canada. Neither can the accident of its funds being invested in Quebec give the Legislature of that Province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situated or invested in the Province of Quebec the Legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by section 92 (2), or may impose conditions upon the transfer or realization of such funds; but that the Quebec Legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867.

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Last of all it was argued for the respondents that, assuming the incompetency of either Provincial Legislature, acting singly, to interfere with the Act of 1848, that statute might be altered or repealed by their joint and harmonious action. The argument is based upon fact, because, in the year 1874, the Legislature of Ontario passed an act (38 Vict., cap. 75), authorizing the union of the four Churches, and containing provisions in regard to the Temporalities Fund and its Board of Management, substantially the same with those of the Quebec Act, 38 Vict., cap. 62, already referred to. It is difficult to understand how the maxim *juncta juvant* is applicable here, seeing that the power of the Provincial Legislature to destroy a law of the old Province of Canada is measured by its capacity to reconstruct what it has destroyed. If the Legislatures of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both Provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the Province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities Fund falls to be applied either in the Province of Quebec or in that of Ontario and that in such amounts or proportions as the needs of the Presbyterian Church of Canada in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require. The Parliament of Canada is, therefore, the only Legislature having power to modify or repeal the provisions of the Act of 1858.

On the assumption that the Legislature of Quebec had not power to alter the provisions of the Act 22 Vict., cap. 66, the respondents still maintain that the appellant cannot prevail in the present action, in respect that he has not sufficient interest to entitle him to sue, and that, even if he has such interest, he is barred from challenging the Act of 1875, by the resolutions of the majority of the Synod, which are said to be binding upon him.

As regards the first of these objections, it is true that the appellant's right to an annuity from the Temporalities Fund is reserved in its integrity by the Act which he impugns, and his own pecuniary interests are, therefore, not affected by its provisions. But the appellant is not a mere annuitant, and his right to an annual allowance does not constitute his only connection with the fund. He is likewise one of the commutors—one of the persons by whom the fund was contributed for the purposes of the Act 22 Vict., cap. 66—and in that capacity he has a plain interest, and consequent right, to insist that the fund shall be administered in strict accordance with law.

The second objection is derived from the resolutions in favor of union carried by the majority of the Synod of the Presbyterian Church

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of Canada in connection with the Church of Scotland, upon the 14th June, 1875. The Quebec Act 38 Vict., cap. 64, deals with the Temporalities Fund in conformity with these resolutions; and it is the contention of the respondents that the appellant is bound by the resolutions, and cannot, therefore, impeach the statute which gives effect to them. That is a startling proposition. If the Legislature of Quebec was incompetent to enact the statute of 1875, it is not easy to understand how the Synod could have power, either directly or indirectly, to validate that Act, or to set aside the enactments of 22 Vict., cap. 61. The respondents do not, indeed, allege that the Synod was possessed of legislative powers, but they assert that the majority, by resolving that the fund, settled under the Act 22 Vict., cap. 66, should in future be administered according to a scheme inconsistent with the provisions of that Act, bound all its members to acquiesce in that new course of administration, and to abstain from enforcing the Statute law of the land. It may be doubted whether a Court of law would sustain such an obligation, even if it were expressly undertaken; but it is unnecessary to discuss that point, because their Lordships are of opinion that the respondents have failed to establish that the appellant, as a member of the Presbyterian Church in connection with the Church of Scotland, undertook any obligation to that effect.

Whether the appellant is bound as alleged by the respondents is, in this case, a question relating exclusively to civil rights, and must, therefore, be dealt with as matter of contract between him and the Synod or Church of which he was admittedly a member at the time when the resolutions in favor of union were carried. In the case of a non-established Presbyterian Church, its constitution, or in other words the terms of the contract under which its members are associated, are rarely embodied in a single document, and must, in part at least, be gathered from the proceedings and practice of its judicatories. Every person who becomes a member of a Church so constituted must be held to have satisfied himself in regard to the proceedings and practice of its Courts, and to have agreed to submit to the precedents which these establish. The respondents were, therefore, justified in referring to the Minutes of the Synod from 1831 to 1875, for the purpose of showing the extent of the power vested in majorities by the constitution of the Church. The minutes, which were founded upon by Counsel for the respondents, afford abundant evidence to the effect that, in all matters which the Synod was competent to deal with and determine, the will of the majority as expressed by their vote was binding upon every member of the Synod, a proposition which the appellant did not dispute. But they contain nothing whatever to show that, in cases where the administration of Church property was regulated by statute, the Synod ever asserted its rights to set aside that legal course of administration, and to restrain dissentient members from challenging any departure from it.

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Their Lordships are therefore, of opinion that the appellant is entitled to have it declared that, notwithstanding the provisions of the Quebec Act of 1875, the constitution of the Board and the administration of the Temporalities Fund are still governed by the Canadian Act of 1858, and that the respondent Board is not duly constituted in terms of that Act; and also to have an injunction restraining the respondents from paying away or otherwise disposing of either the principal or income of the fund.

The appellant, in his application to the Court below, asks a declaration to the effect that the fund in question is held by the respondonts, "in trust, for the benefit of the Presbyterian Church of Canada in connection with the Church of Scotland, and for the benefit of the ministers and missionaries who retain their connection therewith, and who "have not ceased to be ministers thereof, and for no other purpose "whatever." It is obviously inexpedient to make any declaration of that kind. It would be a mere repetition of the language of the Act of 1858, by which the trust is regulated, and would decide nothing as between the parties to the present suit.

The appellant also seeks to have it declared that six reverend gentlemen who, at and prior to the Union of 1875 were members of the Presbyterian Church of Canada in connection with the Church of Scotland, have ceased to possess that character, and that they have no right to the benefits of the Temporalities Fund; and he concludes for an injunction against the respondent corporation making any payment to them. Their Lordships are of opinion that these are matters which cannot be competently decided in the present action. Their decision depends upon the answer to be given to the question, which church or aggregate of churches is now to be considered as being or representing the Presbyterian Church of Canada, in connection with the Church of Scotland, within the meaning of the Act 22 Vict., cap. 65? But the two churches which appear from the record to have rival claims to that position are not represented in this action; and, of the six ministers whose pecuniary interests are assailed by the appellant, he has only called one, the Rev. Dr. Cooke, as a respondent. That question between the Churches must be determined somehow before a constitutional Board can be elected; and, unless the Dominion Parliament intervenes, there will be ample opportunity for a new and protracted litigation. It cannot be determined now, because the appellant has not asked any order from the Court in regard to the formation of the new Board, and has not made the individuals and religious bodies interested parties to this cause.

Substantial success being with the appellant, he must have his costs as against the respondents. But their Lordships are of opinion that neither the respondents' own costs, nor those in which they are found liable to the appellant, ought to come out of the Trust Fund, which they are holding and administering without legal title. The appellant's costs

Doble & Board for the management of the temporalities fund of the Presbyterian Church of Canada in connect'n with the Church of Scotland.

must therefore be paid by the members of the respondent corporation as individuals.

Their Lordships will, accordingly, humbly advise Her Majesty that the judgments under appeal ought to be reversed, and that the cause should be remitted to the Court of Queen's Bench, Lower Canada, with directions to that Court to give effect to the declaration recommended by this Board, and also to issue in appellant's favor an injunction and decree for costs as directed by this Board.

Macmaster, Hall & Greenshields, attorney for the plaintiff in S. C.
J. J. C. Abbott, Q. C., counsel for plaintiff in S. C.
M. M. Tait, counsel for plaintiff in S. C.
John L. Morris, attorney for respondents in S. C.
Strachan Bethune, Q. C., counsel for respondents in S. C.
C. P. Davidson, Q. C., counsel for respondents in S. C.
H. Davey, Q. C., counsel for appellants in P. C.
R. W. McCleod Fullarton, counsel for appellants in P. C.
Donald Macmaster, counsel for appellants in P. C.
J. P. Benjamin, Q. C., counsel for respondents in P. C.
F. H. Jeune, counsel for respondents in P. C.
John L. Morris, counsel for rerpondents in P. C.

PRIVY COUNCIL.

London, November 27, 1883.

Ducondu & Dupuy.

Before Sir Barnes Peacock, Sir Montague Smith, and Sir Arthur Hobhouse.

DUCONDU *et al.*, *v.* DUPUY.

Per Curiam. On the 10th July, 1858, Edward Scallon, who is the predecessor in title of the appellants, contracted with one Benjamin Peck, the predecessor in title of the respondent, to sell to him certain property called timber limits.

The nature of a timber limit is this :—Annual licenses are granted by the Commissioner of Crown Lands to take possession of certain areas of land, to cut timber within those areas or limits. There is an express provision in the statute that if any license is found to cover ground already occupied by a prior license the subsequent license shall to that extent be null and void.

Such being the nature of the property, Scallon contracted to sell all the right and title obtained by him from the Crown. The purchase money was to be paid by instalments, and when the last instalment was paid the conveyance was to be completed by Scallon. The money was

paid; and Scallon being dead, his heirs, the present appellants, executed a deed, dated the 16th March, 1865, for the purpose of completing the conveyance to Cushing, in whom Peck's interest was then vested. In that deed it is stated that they are acting in execution of the prior contract; and they convey and release, with a guarantee against disturbance, all the immovable property and rights which Scallon had promised. Then they proceed to describe it; and they describe it in precisely the same terms as are used in the contract of 1858. The property so described is said to be comprised in 13 different licenses, which purport to convey a title to an area of 256 miles.

Among those licenses are two, numbered 97 and 98, which purport to convey title each to an area of 25 miles on the Assumption River; and the heirs of Scallon declare that the licenses have been renewed up to that time by Peck and his representatives. It turned out that in point of of fact Nos. 97 and 98 had not been renewed, and it seems doubtful whether they were in existence at the time of the contract of 1858. Mr. Fullerton has argued his case on the hypothesis, which he takes as most favorable to himself, that they were not in existence at that time.

On that discovery the parties come together again, and the heirs of Scallon agree to make good the loss accruing to the successors in title of Peck by the non-existence of licenses 97 and 98. The arrangement made by them is contained in a deed of the 22nd October, 1816, executed by one McConville, who for the present purpose is assumed to be the lawful agent of the appellants. The language used by the parties in deed is, as stated in English, to the following effect:—After referring to the prior transactions, they say, "In virtue of that deed"—that is, the deed of 1858,—"Scallon was bound to sell 256 miles of limits for cutting "wood on Crown lands; and as there is found a deficit of 50 miles to "complete the said quantity of 256 miles granted to Cushing, McCon- "ville, in the name of his principals, desiring to fill up the deficit which "has been found, has by these presents granted and conveyed, with "warranty against all disturbances generally, whatsoever, they may be, "to Cushing, the said quantity of 50 miles of limits on the said River "Assumption, described as follows in the English tongue." The description is contained in two other licenses, Nos. 25 and 26. Licence 25 is in these terms:—"Commencing at the upper end limit No. 94 on the "southwest side of L'Assomption River, granted to late Edward Scallon "and extending five miles on said River and five miles back from its "banks, making a limit of 25 square miles, not to interfere with limits "granted or to be renewed in virtue of regulations." *Mutatis mutandis*, license 26 is in the same terms. The deed states that McConville has, for his principals, paid the sum of $500 to Cushing, on account generally of all claims which Cushing may have against the heirs of Scallon, and Cushing further declares that by reason of this deed he has nothing

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to claim, for any cause or reason whatever, against the heirs of Scallon; and a general release is given. McConville on his part gives a general release to Cushing for all claims by the heirs of Scallon.

It is on that deed that the present question arises. The difficulty which has arisen is this: that when the grantee, Cushing, came to work on the limits contained in the licenses 25 and 26 he was stopped by a man of the name of Hall, who claimed to be possessed of the same land in virtue of a prior license from the Crown. There has been a great deal of controversy as to whether the interference by Hall has been properly proved in the suit; but for the purposes of the present decision all that part of the case is assumed in favor of the respondents. Cushing could not get the benefit of all the land described in licenses 25 and 26, by reason of a prior grant to Hall. Cushing accordingly, or his assignee, Dupuy, the present respondent, sues the heirs of Scallon upon the warranty which he alleges that they have given for 50 square miles of timber limits. The question is whether the appellants have given a warranty for those 50 miles of limits absolutely, or only a warranty for the licenses which purport to give a title to the 50 square miles. It is a question of very considerable difficulties. The Courts in Montreal have taken one view, in favor of the appellants; aud the majority of the Supreme Court has taken the other view, in favor of the respondent.

There has been a good deal of question, both in the Courts below, and at the bar here, whether it is proper to go behind the deed of October, 1866. It is quite plain what the course of a court of justice must be. In one sense we cannot go behind the deed of 1866; that is to say, the rights of the parties must be regulated by the construction of that deed, and that deed alone. In another sense we have to go behind it because the deed itself refers to prior transactions. It professes to be founded upon the liability arising out of those prior transactions; and a court cannot properly construe the deed without ascertaining what the position of the parties was at the time when they came to execute it. Now the position of the parties appears to their Lordships to be this: Scallon contracted to sell his right and title to the 13 licenses, which purport to contain 256 square miles. He was not liable to make good a title to the 256 square miles any further than the licenses themselves made a title to them. But he was liable to have and to deliver the licenses which he purported to sell. In point of fact he had not got two of those licenses, and when that fact is discovered his heirs come to make up the deficit, as they call it "*compléter le déficit*;" that is to say, to do what Scallon was bound to do. At that time Scallon was bound to make good in some way the loss sustained by the non-existence of licenses 97 and 98.

What then do the parties do? They make up the deficit by assigning two other licenses. They call it, "50 miles of limits described as

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follows." Even taking the word "limits" to be an ambiguous term, their Lordships are of opinion that "limits described as follows" must be taken to indicate the thing which is sold according to the description which is given. Into that description is imported the condition that the license sold is not to interfere with limits granted or to be renewed in virtue of regulations. Therefore the two licenses which formed the subject of the assignment of 1866 are to be taken exactly as the two missing licenses which form the subject of the contract of 1858 were taken, viz., as conveying only such right, title, and interest as the vendors had obtained from the Crown. Now the guarantee can only extend to the thing that is sold, the very subject of the assignment. If the licenses 25 and 26 were not forthcoming, or if there was any defect in the title of the heirs of Scallon to those licenses, the guarantee might have some operation; but the licenses are forthcoming and have been handed over, and there is no guarantee against a deficiency by reason of a prior grant.

The result is, that, assuming the respondent to be right in all the issues raised by him with respect to the breach of the alleged guarantee, their Lordships are of opinion that no guarantee exists to cover that alleged breach.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the Supreme Court be reversed, and the decrees of the lower Courts restored. The costs of the Appeal will follow the result.

S. Pagnuelo, Q.C., and *Kenelm E. Digby* for appellants.

F. L. Beique and *M. Fullarton* for respondents.

PRIVY COUNCIL, 1883.

London, 8th March, 1883.

Elliott & Lord.

Coram LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, SIR ARTHUR HOBHOUSE.

JAMES ELLIOT, ET AL. *v.* JAMES LORD ET AL.

The appeal was from a judgment of the Court of Queen's Bench at Montreal, a report of which will be found in 27 L.C. Jurist, p. 30.

PER CURIAM. This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal Side), in an action by the appellants against the respondents to recover damages in the nature of demurrage for the detention of the appellants' ship, the "Gresham," at Sydney, N.S., whither she had gone to load under a charter-party dated the 12th of June, 1872. Mr. Justice Torrance, as the Judge of the Superior Court for Lower Canada, Province of Quebec,

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District of Montreal, on the 21st May, 1880, decided that the "Gresham" was unduly detained for seventeen days, and condemned the defendants in £850 damages with interest and costs. This decision was reversed on the 21st of March, 1882, by three of the judges of the Court of Queen's Bench (Appeal side)—one Judge, Mr. Justice Cross dissenting.

No objection was made in this appeal to the amount of the damages, and it was agreed before their Lordships by the respondents' counsel that, if the appellants are entitled to recover damages, they are to be calculated for seventeen days at the rate of £50 per day, as was adjudged by Mr. Justice Torrance.

The appellants were the owners of a steamship called the "Gresham," and the defendants were merchants trading at Montreal under the firm name of Lord, Magor & Munn. On the 12th of June, 1873, the plaintiffs, through Mr. John G. Sidey, their agent at Montreal, entered into a charter-party with the defendants for the hire of the "Gresham," then at Liverpool. The material part of it is as follows:

"It is this day mutually agreed between J. G. Sidey, of Montreal, agent of the good steamship or vessel called the "Gresham," whereof ——————is master, of the measurement of 1801—1162 tons, or thereabouts, now in Liverpool, of the one part, and Messrs. Lord, Magor & Munn, of Montreal, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Sydney, or other port, or so near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and receive prompt despatch in loading and discharging, and to load and discharge always afloat."

The "Gresham" under the command of E. G. Bulkeley, the master, proceeded from Liverpool to Sydney, and arrived there on the morning of Saturday, the 19th of July, 1873, when the master, about 9 a. m. on that morning, notified to Messrs. Archibald & Co., of Sydney, the agents of the charterers there, that she was ready to receive and load her cargo under the charter-party. On the 25th of July a few bunkers of coals were shipped, but no cargo of coals were shipped on board the "Gresham" until the 4th of August, on which day she began to take in cargo coals, and finished loading on the 13th. She was then compelled to leave with less then her full cargo by 300 tons, but no question arises as to this.

The appellants in their declaration alleged that the defendants did not according to the terms of the charter-party load the "Gresham" with a full and complete cargo of coals taking her turn with other steamers, but taking precedence of sailing vessels, and afford and give the said steamship prompt despatch in loading her cargo of coals. And the defendants by their plea averred that they complied with the conditions of the charter-party, and that the "Gresham" had her turn with

other steamers, taking precedence of sailing vessels, according to the custom and usage of the port of Sydney, and had prompt despatch in loading at Sydney. Elliott & Lord.

The material evidence upon this matter is that of Frederick N. Gisborne, the only witness called for the defendants, and the entries in a shipping book of which he produced a copy, and which, he said, contained a complete history of the business done during the period to which they relate. Mr. Gisborne stated he was the engineer of two or three coal companies at Sydney; that all vessels loading from the mines he was attending to were of necessity reported to him, and no other person had any right to enter reports of vessels. Each vessel was put down in turn in the book at the time it was reported, and they were loaded in that order. None of the steamships that were berthed or reported after the "Gresham" were loaded before her, and the "Hibernia" being reported before the "Gresham," was loaded before her. They gave the "Gresham," coal as fast as they could deliver it—as fast as facilities of the mine would allow; the facilities of the pier were greater than the production of the mines, and the vessels could have been loaded in a shorter time or with more despatch if the facilities at the mine had been better.

The following is a copy of the entries in the shipping book:—

"Extracts from Shipping Book.

"1873.

"SS. Kangaroo—Telegraph Cable Fleet.

"Commenced loading, 19th July. Completed, 24th. Cargo, 761 tons.

"SS. Gresham—Reported, 22nd July. Commenced loading, 25th. completed, 13th August. Cargo, 1,830½ tons.

"Schr. Heroine—Arrived, 22nd July. Loaded, 24th. Cargo, 120 tons.

"Schr. Fear not—Arrived, 24th July. Loaded, 25th. Cargo, 52 tons.

"Lchr. Trial—Reported, 25th July. Loaded, 26th. Cargo, 41 tons.

"SS Hibernia—Telegraph Fleet. Reported, 19th July. Commenced loading, 30th. Completed, 5th of August. Cargo, 1,901 tons.

"Schr. Rebecca Ann—Arrived 31st July. Loaded, 1st and 2nd August. Cargo, 192 tons.

"SS. Alpha—Completed discharging, 1st August. Commenced loading, 7th August. Completed 16th. Cargo, 1,959 tons.

"SS. R. M. Hunton took 143 tons bunker coal 6th and 7th August.

"SS. Crossby took 234 tons bunker coal 11th and 15th August."

It was explained by Mr. Gisborne that the three schooners, "Heroine," "Fear Not" and "Trial," occupied inside berths where no large steamers could lie, and the loading of them did not interfere with the loading of the larger vessels. But the "Hibernia" which was reported on the 19th July, did not commence loading until the 30th, and between the 24th and 30th only three small cargoes of 120, 52 and 41 tons respectively, were loaded, viz., on the 24th, 25th and 26th. No coals were

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loaded on the three following days, and the loading of the "Hibernia's cargo" of 1,901 tons was completed between the 4th and 13th of August, only a few bunker coals having been loaded on the 25th of July. These dates show the time within which it was possible to load the cargoes if the coals had been ready.

The arrival of the "Gresham" having been notified to the defendants' agents on the 19th of July, the plaintiffs were, by the terms of the charter-party, entitled to a full and complete cargo of coals on that day. The respondents' counsel did not dispute that when the ship is ready to load the charterers must have a cargo ready, but he contended that they were not bound to do anything till the ship was in her turn, and it was not shown that she did not begin to load before the 5th of August because the cargo was not ready. The facts, however, are, that the defendants employed the same person, the agent of the coal companies, to load the "Gresham" as was employed to load the "Hibernia." In consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port, by which the loading of the "Hibernia" was delayed. The deficiency of coals, and not the waiting for her turn, was the cause of the "Gresham" not sooner obtaining her cargo.

The defendants undertook that the ship should receive prompt despatch in loading, and their Lordships are of opinion that they are responsible for this delay.

It is not necessary to consider whether the "Gresham" was thus delayed for the whole of the 17 days, it having been agreed that £850 shall be taken as the amount of the damages. Their Lordships therefore, will humbly advise Her Majesty to reverse the decree of the Court of Queen's Bench (Appeal Side), and to affirm the judgment of the Superior Court of the 21st May, 1880, with costs. And the respondents will pay the costs of this appeal.

C. P. Butt, Q. C., and *Dunlop & Lyman*, for appellants.

Cohen, Q. C., and *Kerr, Carter & McGibbon*, for respondents.

PRIVY COUNCIL.

London, November 24, 1883

Before: LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH and SIR ARTHUR HOBHOUSE.

FRECHETTE *v.* LA COMPAGNIE MANUFACTURIERE DE ST. HYACINTHE.

PER CURIAM. The parties to this suit are owners of contiguous lands on the left bank of the River Yamaska; the plaintiffs, who are respondents, being the owners of the upper lands, and the defendants, one of whom is the appellant, of the lower. The complaint is that the defendants have lately erected a barrier which prevents the water flowing in due course from off the land of the plaintiffs.

To understand the position of affairs it is convenient to refer to a plan put in by the defendants. Prior to the year 1878 matters stood as follows:—The whole river was traversed by a dyke marked A, which conducted the water to a mill (No. 4) belonging to the plaintiffs. After working that mill the water escaped into the natural channel of the river, and was not diverted again by the plaintiffs until nearly 100 yards below mill No. 4, where it reached the head of another dyke (Dyke No. 1), which was built near and nearly parallel to the left bank, and which caught a portion of the stream and carried it to another mill (Mill No. 1) belonging to the plaintiffs, the rest of the stream was caught by a dyke (Dyke No. 3), tho head of which was in mid-channel opposite Mill No. 4 and which conducted the water to the defendants' Mill No. 3. The water escaping through the tail race of Mill No. 1 also descended to Mill No 3, but how it was used there, if used at all, does not clearly appear. Early in the year 1878 the plaintiffs carried Dyke No. 1 up the river to a point above the head of Dyke No. 3, and there connected it with a reef of shingle which extends to the right bank of the river. By this work the whole stream has been intercepted below Mill No. 4 and conducted to Mill No. 1, except when there is water enough to overflow the reef of shingle, and except so much as may leak through the dyke or through the reef. The defendant says that water has thus been taken away from the water-course formed by Dyke No. 3; and in the month of June, 1878, for the purpose as he alleges of recouping himself, he erected a barrier so as to prevent the escape of water from the tail race of Mill No. 1, and to form a head of water for a new mill which he built just below No. 3. The plaintiffs have also built a new mill (Mill No. 2) just below No. 1, and have excavated the bed of the river to receive their new wheels.

There has been considerable controversy whether the defendants' operations have impeded the working of Mill No. 1 or only that of Mill No. 2, but, in their Lordship's opinion, the controversy is not now ma-

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terial. The important fact is that the defendants' barrier has been found to bay back the water to a maximum depth of 22 inches at point A, which is the dividing line of the two properties. And the important question is, whether the plaintiffs are entitled to have the barriers so lowered that the water shall not be bayed back to any extent at all at Point A.

By the Civil Code of Quebec all rights to flowing water are classed under the head of servitudes; and by sect. 500 real servitudes are divided into three classes, according as they arise from the natural position of the property, from the law, or from the act of man. Servitudes arising from the law have nothing to do with the present question.

Sect. 501, which deals with servitudes of the first class, is as follows; —"Lands on a lower level are subject towards those on a higher level to "receive such waters as flow from the latter naturally and without the "agency of man. The proprietor of the lower land cannot raise any "dam to prevent this flow. The proprietor of the higher land can do "nothing to aggravate the servitude of the lower land."

Sect. 503 applies specially to rivers. It says. "He whose land bord- "ers on a running stream may make use of it as it passes for the utility "of his land, but in such manner as not to prevent the exercise of the "same right by those to whom it belongs, saving the provisions con- "tained in Cap. 51 of the Consolidated Statutes for Lower Canada, or "other special enactments." "The same right" their Lordships take to mean the right to make use of the running stream at it passes the bordering land.

Unless then the provisions of the Code are limited by some special enactment, the plaintiffs have a right to say that the flow of water from their land shall not be impeded, so far as it is a natural flow, and independant of the agency of man. In this case the natural flow of the river has been altered by the agency of man for a long time, but an artificial flow may acquire as ample a right to protection as a natural flow.

The 3rd cap. of the 4th title of the Code treats of servitudes established by the act of man. Sect. 545 recognizes the right of every proprietor to subject his property to such servitudes as he may think proper consistently with public order. Sects. 549 and 550 are as follows;—

"No servitude can be established without a title; possession even immemorial is insufficient for that purpose."

"The want of a title creating the servitude can only be supplied by an act of recognition proceding from the proprietor of the land subject thereto."

"Title," which answers to "titre," means a written or express grant.

Now as regards the flow of water which existed prior to 1878, and which it may be convenient to call the established flow, it is not now disputed but that the plaintiffs became and were, just before the execu-

tion of their new works, rightfully possessed (whether by title or by some act of recognition does not clearly appear), of what, according to the Code, is a servitude over the defendants' property. Their Lordships consider that the plaintiffs then had, at least as between them and the defendants, the same right to protection for the established flow as if it were the natural flow. The defendants might not raise any dam to obstruct the established flow.

The appellant's counsel contended strongly at the bar that the working of the plaintiffs' mill has not been impeded or only impeded to a slight extent, and that the defendants have been materially injured by the abstraction of water. But their Lordships did not think it necessary to hear the respondent's counsel on those points. For the right to resist interference witn a natural flow of water, or a flow legally established, is independent of the natural user of the water. Neither would the plaintiff's right to have the established flow protected be barred by the mere fact that the defendants may have been injured by deprivation of water owing to the extension of Dyke No. 1. That might give the defendants a right to sue for damages, or to remove the dyke ; but it does not follow that they can interfere with the established flow from the plaintiff's land.

The appellant's counsel also insisted strongly that the action is wrong in form, but their Lordships see no reason to differ from the two Quebec Courts on this point.

The question whether Chapter 51 of the Consolidated Statutes does not confine the plaintiffs to a single remedy, viz., that of pecuniary damages, is a more substantial one. Tnere is certainly great difficulty in so construing the Code and the statute as to produce a clear and harmonious result for the whole. There is nothing on the face of the statute itself to limit the generality of the powers it appears to confer on riparian owners. It was stated at the bar that there has been a course of decisions in Canada which had the effect of placing a limit on the general terms of the statute. But the only case cited, that which is stated in the respondent's factum filed 11th May, 1881, appears only to refer to the mode of ascertaining damages. And the Judges in the Lower Courts do not refer to any course of decision, while they entertain a great diversity of view as to the limits within which the statute is to be construed. The Superior Court appears to think that the statute is no answer to actions founded on common right and on actual injury. Mr. Justice Ramsay, while impugning both the motives and the capacity of its framers, think it means nothing more than that if and when damages are sued for they shall be ascertained by referees. The rest of the Court in one passage express an opinion that the statute was not intended to operate against those who had turned running waters to use, and in another, that it was intended to operate only against landowners and not against millowners. It is difficult to find the foundation

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for any of these limitations. At the same time, their Lordships find it difficult to suppose that by the saving of the statute contained in Sect. 503, the Code intended to give no remedy whatever beyond pecuniary compensation for any violation of its rules. The question was very ably argued at the bar, but in the result their Lordships do not find it necessary to pronounce any opinion on it.

The substantial difficulty in the way of the plaintiffs is this: that they are seeking to establish a new and different servitude by the act of man without either grant or recognition; that they have not alleged or proved what was the precise servitude which existed prior to 1878; and that the decree which they have obtained proceeds on the assumption that the existing state of things is the natural state, or at least that there is identity between the state of things before and after the plaintiffs' operations of 1879. This is the difficulty to which the attention of their counsel was specially called, and to see how it stands it is necessary to examine the proceedings with some particularity.

In the declaration filed by the plaintiffs, they set forth their documents of title, and allege that they have had for upwards of 62 years the rights, privileges and water powers *actually used by them.* They pray for a declaration that the defendants have illegally disturbed the enjoyment of them, and for demolition of the defendant's barrier. It is clear then that, so far, the plaintiffs make no distinction between the existing flow of water and the established flow.

The defendants on their part rely on the alterations of 1878. They say in substance that the mischief is caused by the plaintiffs' own works executed below Mill No. 1 in the preceding spring and summer; that the extension of Dyke No. 1 has caught all the water and carried it down to Mill No. 1; that by collecting so large a quantity of water into the narrow space on the left bank, the plaintiffs have themselves to blame it if at that point the water is more abundant than they like; and that they have no grant (*titre*) giving them a right so to use the river.

In reply to these defences the plaintiffs do not fall back on their right to the natural or the established flow of the water. As regards their works below Mill No. I, they say that the defendants' allegations are false in fact. And as to all their recent operations, they say that their only object has been to preserve the water and conduct it from one of their mills to another, *os they have always done.*

At the wish of both parties experts were appointed by the Court to to report upon instructions given to them by the Court. They were to state,—

1. The conditions of the localities and of the erections described in the writings of the parties, both before and after the said erections.
2. The works of the defendants.

3. The nature of those works, and whether they are calculated to injure the working of the water power used by the plaintiffs before they were completed.
4. What should be done so that each party may use the water without injury to the other.
5 What amount of damages, if any, should be paid by the defendants to the plaintiffs.

These instructions are not pointed to the effect of the plaintiffs' operations, but rather indicate that the only question is whether the flow existing at the time of the defendants' operations has been impeded.

In answer to the first and second questions the experts show the construction of the old and new mills to the effect hereinbefore stated but they say nothing about the extension of Dyke No. 1, nor do they show what was the former flow of the water, or the bed of the river, or in any other respect what was the state of the localities prior to the execution of the recent works of the plaintiffs. In answer to the third question they find that the defendants' new barrier bays back the water to the depth of about two feet at the boundary line, Point A. In answer to the fourth question they find the the defendants ought to lower their barrier 22 inches, so as not to bay back the water at all over Point A. And they award $100 for damage.

The parties then went into evidence, and the cause came on for hearing before Mr. Justice Sicotte, Judge of the Superior Court. That learned Judge gave the plaintiffs a decree in precise accordance with the opinion of the experts. The decree is founded on recitals showing that the plaintiffs have been in possession of a real right for a year and a day, using the upper waters and letting them escape over the land of the defendants. Then it states that the barrier raised by the defendants has obstructed the waters in *their natural course such as it was formerly*.

It is clear then that the Superior Court paid no attention to the alteration effected by the plaintiffs' works in 1878. The recital of possession for a year and a day is true of the prior state of things, but is not true of the existing state of things. Nor is the present course of the water its natural course, nor such as it was formerly.

On appeal to the Queen's Bench, there was a difference of opinion among the Judges. Mr. Justice Ramsay states very clearly the point of the defence which is now under discussion. He says, "The defendants "answer that they have not stopped the natural flow of the water, but "that the plaintiff has, by increasing his own works above, directed the "waters of the river out of their natural course, and so created an artificial accumulation of water which can only escape through the tail "race." He thinks this would be a good defence if it were not for the acquiescence or recognition of the defendants. But there is no evidence of such acquiescence in the plaintiffs' works of 1878. The evidence

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referred to by Mr. Justice Ramsay consists of two acts. First, the construction by the defendants of Dyke No. 3, which was long prior to the extension of Dyke No. 1. Secondly, the construction of the works now complained of. But in the first place, though it is true that by their new works the defendants sought to take advantage of the new flow of water, they did so because their former flow was partially cut off. And in the second place an act can hardly be treated as acquiescence in favour of a person who have ever since been contending against it, and striving to destroy it. It is at the utmost acquiescence on condition of enjoying the thing acquiesced in, and if that condition is taken away, so is the acquiescence.

Having thus disposed of the defence founded on extension of Dyke No. 1, Mr. Justice Ramsay addresses himself to the question of damage. He thinks that there is no sufficient evidence of damage, and would either dismiss the action or remit it for further report by experts.

The opinion of the rest of the Court was delivered by Mr. Justice Tessier. That learned Judge states the defendants' plea that the plaintiffs themselves have caused the mischief complained of, but he thinks it completely answered by the report of the experts in answer to the 3rd question. Now that question and answer relate only to the existing flow of water, and have absolutely no bearing on the prior question whether the plaintiffs are entitled to have that flow protected. Mr. Justice Tessier then quotes Art. 501 of the Code, and says that the Company have not added anything to the volume of the water by the hand of man, because they have not introduced any foreign water into the Yamaska. On these grounds the Court decides for the plaintiffs, and dismisses the appeal.

It is true, indeed, that the plaintiffs have not increased the whole volume of the Yamaska, but they may have accumulated the waters of that river into a small space, and so have increased their depth at the point where they complain of it, and have augmented the servitude they desire to enforce. This is the very thing which the Court of Queen's Bench appear to think would be material if only it had been done by introducing fresh water into Yamaska, instead of being done by a readjustment of the waters of Yamaska itself. That it must have been done to some extent seems evident from the plan, and the respondents' counsel so admitted. It results also from the evidence given by Bertrand and by Delisle, showing how the water which used to flow to the right of Dyke No. 1 now flows to the left. The plaintiffs have left the point untouched by evidence. Whether the difference is much or little has not been ascertained. By Sect. 501 of the Code, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. The plaintiffs have certainly accumulated the volume of the water, and have probably increased its depth in the narrow channel up to the dividing line. To that extent they are aggravating the servitude

of the lower land, and to that extent at least they have no right to demand, as they do demand, a free course for the water sent down by them. That the matter is left in this uncertainty is the fault of the plaintiffs who are bound to allege and prove a case entitling them to relief. They come into Court insisting on their right to keep unstructed the flow of water which they say has existed as it now is for more than 60 years. The issue is distinctly raised that the existing flow is not the ancient one ; but they continue to insist that it is, and refuse to shape the case so as to try the question whether or no they are really entitled to some relief on the ground that the established flow had been interfered with, and to get that amount of relief. It is unsatisfactory to dispose of a case on such grounds, but their Lordships cannot see by what right the defendants are to be compelled to keep their dam so low that the whole volume of water, as accumulated and increased by the plaintiffs, shall run away unobstructed.

It is not easy to find decisions precisely applicable to such peculiar circumstances ; but their Lordships have not been referred to and are not aware of any case in which the plaintiff has obtained relief in respect of any servitude except that to which he has clearly alleged and proved his right.

In *Saunders* v. *Newman*, 1 B. & A. 258, the plaintiff had acquired a prescriptive right to an artificial flow of water. All he had done within recent times was to alter the construction of the wheel turned by the water. It was held that the defendant, a lower proprietor, had no right to obstruct the ancient flow ; but it seems clear from the observations of the Judges that the decision would have been otherwise if the plaintiff's operations had substantially altered the flow of the water. Abbott J., says, " When a mill has been erected upon a stream for a long period " of time, it gives to the owner a right that the water shall continue to " flow to and from the mill in the manner in which it has been accus- " tomed to flow during all that time. The owner is not bound to use the " water in the same precise manner, or to apply it to the small mill. If " he was, that would stop all improvements in machinery. If indeed the " alterations made from time to time prejudice the right of the lower " mill, the case would be different ; but here the alteration is by no " means injurious, for the old wheel drew more water than the new " one. "

Tapling v. *Jones*, 11 H. L. 290, was cited as an authority for the plaintiffs ; but so far as it bears upon the point under discussion it favours the argument for the defendants. For the plaintiff in *Tapling* v. *Jones* succeeded in getting protection for nothing but his ancient light ; those very rays of light to which he had acquired an indefeasible right. Lord Westbury says :—" In the present case an ancient window in the " plaintiff's house has been preserved, and remain unaltered during all " the alterations of the holding. . . . . The appellants' wall, so far

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" as it obstructed the access of light to the respondent's ancient unal-
" tered window, was an illegal obstruction." And Lord Chelmsford, in answering the argument that the alteration of window had changed the character of the right so as to destroy it, says, " But it is not easy to " comprehend how this effect can be produced by acts wholly uncon-" nected with an ancient window which the owner has carefully retained in its original state."

It may be inferred from these judgments that, if the plaintiff in *Tapling* v. *Jones* had so mixed up his old lights with his new ones that they could not be distinguished, he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the plaintiff's deed aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights. In the case of an augmented flow of water the servitude of the lower proprietor is aggravated.

The result is that the Plaintiffs have insisted on enjoyment to which they have shown no legal title, and have not proved or even alleged any case for relief in respect of that enjoyment to which they may have had a title. Their Lordships have anxiously considered whether it is possible usefully to remit the case to be tried on the true issues. They are however, convinced that an attempt to do so will not save time or money, and that the litigation must follow the strict course. They will humbly advise Her Majesty to rever-e the decrees below and to dismiss the action with costs. The costs of this appeai will follow the result.

Judgment reversed.

Henry Matthews, Q.C., and *Macleod Fullerton*, counsel for the Appellant.

Bompas, Q.C., and *Kenelm E. Digby*, counsel for the Respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Goldring & Banque d'Hochelaga.

London, Feb. 7, 1830.

Before SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

GOLDRING v. LA BANQUE D'HOCHELAGA.

PER CURIAM. Their lordships, upon the best consideration they can give to this case, are opinion that it is not one in which it was competent to the Court of Queen's Bench to grant the leave to appeal, The 1178th Article of the Code of Procedure is precise, that an appeal lies to Her Majesty in Her Privy Counsil from final judgments rendered in appeal or error by the Court of Queen's Bench. Then it gives the cases in which the appeal is allowed. There is no express provision for the allowance of such an appeal from an interlocutory order. The argument in support of the order of the Court has proceeded chiefly upon Art. 822 of the same Code, which is one of those which relate to procedure in respect of writs of capias. That article appears to their lordships clearly to imply that the decisions to which it relates are no more than interlocutory orders. If the decision of the Superior Court on the matter therein referred to had been regarded as a final judgment, there would have been no necessity to give by this article special leave to appeal, because it would have been appealable under Art. 1115, as pointed out by Mr. Digby. The real object of the article is to make special provision for an appeal to the Court of Queen's Bench from an interlocutory order of a particular kind. The Code gives by Art. 1116 an appeal againgst certain other interlocutory judgments, but in these cases Art. 1119 provides that there must be a preliminary motion before the Appellate Court, in order that that court may decide whether the particular judgment falls properly within the terms of Art. 1116. But an appeal from an interlocutory judgment under Art. 822 was not to be subject to that provision, and hence the necessity for that article.

The judgment of the Court of Queen's Bench upon a judgment of the Superior Court in this matter, cannot be regarded as a final judgment within the meaning of Art. 1178, unless it can be shown that proceedings under the provisions of Art. 796 and the subsequent Articles of the Code which relate to the particular subject of *capias ad respondendum*, are so severed from the general suit that they are to be treated as something separate in their nature, and not as incident to the suit. Their lordships are of opinion that the Code has not expressed that they are to be so treated, and that from their nature they are merely incidental to the suit and in the nature of process therein. They are, therefore, of opinion that the judgment of the Queen's Bench, which is the subject of the appeal, is not a final judgment within the meaning of the Code, and consequently that the appeal has not been regularly brought before Her Majesty in Council.

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It has been suggested that their lordships may now recommend Her Majesty to grant, as they have unquestionably power to do, special leave to appeal; but they are of opinion that there are not before them sufficient grounds for making such a recommendation. They, therefore, think that the prayer of this petition must be granted; but, considering that the point is novel, and that the Court of Queen's Bench has seen fit to allow that appeal, they do not think it is a case for costs. Their lordships will, therefore, humbly advise Her Majesty accordingly.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Gravel & Martin et al.

5th May, 1876.

Coram SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

PEERRE GRAVEL *v.* PIERRE P. MARTIN ET AL.

On the 18th of June, 1869, the defendant, as a clerk or servant of the plaintiffs, was entrusted by them with a considerable sum of money for the purpose of carrying it to England to make purchases for them, and to pay debts which they owed in England. The money was packed by the plaintiffs in a valise, and that valise was put into a cabin, No. 101, which had been taken for the defendant in a steamer called the "Quebec," a river steamer, in which the defendant was to go from Montreal to Quebec, in order to proceed to England on board a transatlantic steamer which lay at Quebec. The defendant, having accepted the money, it was necessary for him to account for it if he did not use it in the manner in which he was employed to use it; and the account of the money which he gave to the plaintiffs was this: that whilst he was on board the steamer "Quebec" a portion of the money was stolen, and that he had put the rest into the hands of the captain, who had handed it over to the plaintiffs. It is admitted that the *onus* lay upon the defendant to prove that the robbery was committed. Many witnesses were called on the part of the defendant to prove that the money was stolen, and the Court must judge of the fact whether the money was or was not stolen by the evidence given at the trial by witnesses who were subjected to cross-examination, and not by depositions which were given before the magistrates, when the plaintiffs had no opportunity of cross-examining the deponents.

The learned Judge who tried the case in the first instance, Mr. Justice Beaudry, says,—"The defendant has not proved the exception "which he has pleaded, by which he alleged that he was the victim of "a robbery of the bulk of the money which had been confided to him,

"and he has not been able to discharge himself from the obligation to "account for the money." Gravel & Martin et al.

The case was appealed to the Court of Queen's Bench, and was argued before four Judges, of whom the majority substantially affirmed the decision of Mr. Justice Beaudry. One of the Judges, however, Mr. Justice Taschereau, thought that the judgment of Mr. Justice Beaudry was wrong, and what we are called upon to do now is to reverse the decision of the majority of the Judges of the Court of Queen's Bench, and to say that they ought to have reversed the judgment of Mr. Justice Beaudry.

Their Lordships are always reluctant to reverse a finding upon a mere question of fact, even by a single Court of Justice, but they are *still* more reluctant so to do when the decision of the Court who tries the case in the first instance has been affirmed by a Superior Court of Justice, and when there are two concurrent judgments upon a question of fact. As a general rule their Lordships do not interfere with such a finding, and there must be some very good reason to induce them to reverse a decision of a Court upon a question of fact, when that decision affirms the decision of a lower Court.

Now, dealing with the evidence which was given upon the trial, we are met by the statement which the defendant himself gave three days after the alleged robbery was committed. He says the robbery was committed on the 19th June. On the 21st of June he made a statement before the magistrates as to the circumstances under which the alleged robbery was committed. Now the circumstances which he then related, when the facts must have been fresh in his memory, are wholly at variance with the evidence which he gave at the trial, both as to the time at which the robbery took place and as to the place at which it took place. On the trial he stated that when he found the steamer moving he went to the steward to ask him to assist him in removing his valise. He says that about ten minutes elapsed between the time when he left his cabin and all was right and the time when he found the steward. But upon his first examination before the magistrates he stated that the robbery had taken place before the steamer left the quay, and that he gave information to the police upon the subject; and one of the detective police officers also states that defendant told him that the robbery had taken place before the steamer left the quay. Then the question is, are we to say that the judges were wrong in disbelieving the evidence which the defendant gave upon the trial of the cause when he had given previously, on the 21st of June, 1869, only two days after the alleged robbery had taken place, and when the facts must have been fresh in his memory, a statement wholly inconsistent with that evidence? There are many other discrepancies between the evidence which he gave at the trial and the statement which he made before the police magistrates; and there are also discrepancies between his evidence and

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the evidence of Biron the steward. He says then when he looked into the cabin he saw the valise on the floor, opened, and then he exclaimed "My God! I have been robbed." Biron, on the other hand, stated in his affidavit, that when he entered the cabin the valise was on the berth and that the defendant opened the valise. So that the valise must have been lying, if Biron's evidence is correct, on the berth in the cabin, closed up; and if it was in that state, the defendant must have been wrong in stating that when he looked into his cabin he saw the valise lying on the ground, opened, and everything in disorder. But it must be said, with reference to that statement which Biron made in his affidavit, that he did not state in his evidence anything as to where the portmanteau was found. At page 64, line 20, he said. "After that passed "by the cabin No. 101; the defendant followed me, and we passed "behind the cabin. The defendant entered into the cabin through the "window. As to me, I do not recollect whether I entered in the cabin "or whether I remained at the window, but I recollect well upon entering "the cabin the defendant lifted the cover of the valise and took out his "clothes, which he threw upon the ground."

Now, with the inconsistent statement which the defendant made before the magistrates when the matter was fresh in his memory, we are called upon to say that the two Courts of Justice who have found that the defendant had failed to prove that the robbery was committed were in error, and that we ought to reverse their decision, and find that the defendant has proved satisfactorily by the evidence at the trial that a robbery was committed.

None of the judges found, as a fact, that the defendant himself committed the robbery, and their Lordships abstain from expressing any opinion upon that subject. All that the judges did below was to find that the defendant had not proved that the money was stolen, and that is all that their Lordships do in affirming the judgment of the Court of Queen's Bench.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court of Queen's Bench. The appellant must pay the costs of this appeal.

Judgment confirmed.

Benjamin, Q. C., & Bonpas, for appellant.

Matthews, Q. C., & Fullarton, for respondent.

PRIVY COUNCIL, 1878.

25th January, 1878.

Present:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Robert P. Collier.

KERSHAW *v.* KIRKPATRICK et al.

This was an action for money had and received, to which the general issue was pleaded. The question in the cause may be shortly stated to have been the appropriation of a payment, on which the lower Court, and the Court of Queen's Bench, have found in favour of the plaintiff. The material facts of the case are as follows: Mr. Kershaw, the defendant, a broker, bought a cargo of wheat as a broker from the plaintiffs, Kirkpatrick & Co., for and on behalf of a firm named Stevenson. The quantity of wheat bought was on the whole some 13,000 bushels. There was, however, a separate invoice with respect to 8,127 bushels, the price of which amounted to 10,000 and some dollars. Mr. Kershaw had also acted as broker in another transaction whereby Stevenson became the purchaser of the cargo of another vessel called the "Europe," of which the price was some 17,000 dollars. In this cargo Kershaw appears to have had some interest himself, but it had been pledged to the Bank of Montreal, who were the ostensible vendors. On these two accounts a sum of about 37,000 dollars was due from Stevenson to Kershaw on the 18th of July, 1874. On that day Kershaw sent his clerk, a Mr. Benac, to Stevenson's office to get what money he could on account. Mr. Stevenson, the plaintiff's principal witness, gives the following account of what then took place. He says, "Mr. Benac, "Kershaw's clerk, who is in the habit of acting for him sometimes, came "into the office and asked me how much I could give him, and I told "him I did not know. I would give him as much as I could. There, "was some mention of 20,000 or 30,000 dollars. I said I could not give, "him much that day. He went away, and in a few minutes came back "again, when I told him I had been disappointed in getting money. I "drew a check for 8,000 dollars and handed it to Mr. Benac. That "account paper "B" being with a lot of other accounts, I handed the "account to Mr. Benac with a cheque, and he marked the words July "18th, cash on account, P. Benac, 8,000 dollars." In page 15 of the case that document is set out. It is an invoice of wheat sold by Kirkpatrick & Co. to Stevenson, of the 15th of July, and runs in this way: "8,127 30/60 bushels Amber Michigan Wheat ex barge 'Swan' into "'Elisabeth Alice, at 1.25= - - $10,159.37

Brokerage 40.63

$10,200.00"

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Below the $10,200.00 is the entry " July 18, cash on account with the bank $8,000," which is what this witness referred to as having been written by Mr. Benac at that time on this invoice. It may be here observed that it was not written on the back of the invoice, but on the face of it and under the figures which have been referred to. There are in this exhibit also the words " Balance, $2,200." But it does not appear distinctly when and where those words, which are in pencil, were written. Mr. Stevenson goes on to say, " The invoice, after the money " was paid and the receipt written, was in the same state as it is now, " with the exception of some figures in pencil. I fancy the cheque I " gave was paid. It was on the Union Bank." He identifies the cheque. Cross-examined, he says, " The wheat was from the barge ' Swan.' I " employed Mr. Kershaw to buy the wheat. He was my broker. Mr. " Benac, when he came for the money, said, as near as I can recollect, " ' Is that all you can give me,' and I gave him the cheque for the 8,000 ' dollars. The first time he came was the 18th July, about 12 o'clock. He asked me how much I could give him, and I said I could not tell. " He then said, ' How much do you expect ? ' and I said ' 20,000 or " 30,000 dollars.' That is all that transpired at that interview. He came " back again about half-past 12. He said, ' How much can you give " me ? ' I said, ' So far I have only been able to get 8,000 or 9,000,' and " I handed him the account and a cheque. He made some remark " about not taking it on that account." (It should be observed that Mr. Benac, when called, does not in any way corroborate this latter statement.) " His precise words when he came in were, ' How much " can you give me ? ' and I said, ' Take that in the meantime, and I will " see if I can do any more.' " He says, further on, Benac returned in about 10 minutes, " and said, that Mr. Kershaw would not receive that " upon account of the ' Swan's ' cargo, that is plaintiff's debt; and to " change the receipt. I said to Benac, ' I am going away, we can leave ' that until Monday.' He said the 8,000 dollars was not to be on ' account of Kirkpatrick & Cookson, but on account of the ' Europe,' " which was an older debt of some days before. I said I was just going " away, and I would see and straighten it upon Monday. I was going " away early, at half-past one. I was going to the country to St. Hilaire " by the 2 o'clock train. That is all that transpired on the Saturday " between me and Benac." Then he goes on to speak of what subsequently took place. " I received a visit from Kirkpatrick that after- " noon about 10 minutes after Benac was gone. Mr. Kirkpatrick came " to my office, and asked for some money on that debt of the ' Swan.' " I said I could not give him the whole. He said, ' Give me some.' I " said, ' I have given Mr. Kershaw all I had, and I suppose he will give " you some.' That was all that transpired at that interview. Mr. Kirk- " patrick then went away, but came back in 5 or 10 minutes. I fancy " from the direction which I saw him coming from, that he went to Mr.

" Kershaw's. He said that Mr. Kershaw had said that he had no money " for him. I said I supposed he had applied it to some other account. " He then asked me if I could not give him some, and I then gave him " a cheque, I think, for 4,000 dollars. I did not take a receipt for that " payment, to the best of my recollection. The cheque was made pay- " able to the firm's order. I do not recollect whether it was that " Saturday or the Monday following that he told me that he would look " to me for the account. He said I was not to pay any more money to " Mr. Kershaw, but that he looked to me for the entire amount of the " wheat purchased. I paid Mr. Kirkpatrick afterwards 5,000 dollars, " either on the Monday or the Tuesday following." Then the question is put, " Is it not a fact that Mr. Kirkpatrick, time after time, and after " payment by you of 4,000 or 5,000 dollars, dunned you for the payment " of the balance of the cargo of the ' Swan ? ' Answer :—Yes, on several " occasions he asked me for the balance. I saw Mr. Kershaw on the " Monday. He told me that he had sent Benac over to say that he " would not accept that payment on account of Kirkpatrick & Cookson, " and to cancel that receipt and put it to the account of the ' Europe,' " which was due long before that to which he had paid it. I said it was " no use doing anything about the matter, it could easily be explained. " He said the money was for the ' Europe's cargo, which was due before " that, and that he had sent Benac over to say so. I refused to cancel " it. I did not think it was worth while to cancel it. I said to Mr. Ker- " shaw it was much better to leave it as it was and explain the circum- " stances. I got the ' Europe's ' wheat from Mr. Kershaw, who had given " a ' Bailee ' receipt to the Bank of Montreal." Then he says, " When " Mr. Kirkpatrick came to my office I told him that the $8,000 I had " paid I expected Mr. Kershaw would give him some of it. I did say in " my deposition before the police magistrate that I said to Mr. Kirk- " patrick that I expected the 8,000 dollars I had given to Benac was for " him (Kirkpatrick). I had previously promised Kirkpatrick to pay " him his account on that day." Then there is a little explanation on his re-cross-examination, the question being, " You have stated in answer " to Mr. Kerr, that you have sworn in your deposition at the Police " Court that you had told Mr. Kirkpatrick on the 18th of July that you " were under the impression that you had paid Mr. Benac 8,000 dollars " which you expected was for him, did you not also state, to complete " the same sentence which did not end there, the following words, ' but " as there were other accounts running between Mr. Kershaw and me " that it had been applied to something else ?' Answer : I did."

There is also the evidence of Benac, which does not throw much more light upon the main question in the cause, how and under what circumstances the invoice was given to him, and he wrote the receipt. He gives a short account of what took place at the interview, but without stating the circumstances under which he received the invoice or

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wrote upon it. He only refers to it incidentally by saying, "I brought "back the cheque to the office and handed it to Mr. Kershaw. Mr. "Kershaw asked me if it was intended for any particular account. I "said to Mr. Kershaw, 'No; Mr. Stevenson did not tell me anything "'about it, but I think I gave a receipt for the money on Mr. Kirk-"'patrick's invoice.'" Then he further says: "I was in a great hurry, "and I took the first invoice in order to acknowledge the sum which I "received from Stevenson. It was merely accidental; if it had been "another account it would have been the same thing. There were a "lot of accounts together. Generally we do the same thing in all the "houses where we are doing business. This does not appear to their Lordships a very probable statement, considering the importance attached by the Canadian Law, somewhat greater than that attached by our law, to instruments of this description.

The judgments of the two Courts are very short. The first is the judgment of Mr. Justice Mackay, who, as their Lordships understand, had the witnesses before him. It consists, as far as the decision on the point in the cause is concerned, in these words: "Considering that the "defendant on the 18th day of July last received 8,000 dollars, money "for plaintiffs, as alleged, from J. B. Stevenson & Co., purchasers of "plaintiffs' wheat, that at the time of payment of it J. B. Stevenson & "Co., meant it for plaintiffs." Their Lordships, therefore, observe that Mr. Justice Mackay finds as a fact that the money was meant, that is, meant by Stevenson, for the plaintifis. He goes on to say. "And "defendant so expressed it by the account rendered and receipt given "to the said J, B. Stevenson & Co., on the said 18th day of July last, "against which defendant cannot go, certainly not under his plea "pleaded (mere general issue)."

Their Lordships do not read this judgment as ruling that the receipt *per se* would be conclusive, and that the plaintiff could not go against it; but that the receipt having been given, effectuating the intention of the parties, or at all events the intention of the debtor, who had a right to appropriate the payment, he connot be impugned at all events under these pleadings.

The judgment of the Court of Queen's Bench recites what seem to the Court the most material facts thus: "On the 15th of July 1874, the "said Thomas Kershaw, acting as agent of the respondents, rendered to "the said J. B. Stevenson & Co. an account for 8,127½ bushels of amber "Michigan wheat, so sold and delivered to the said J. B. Stevenson & "Co. by the respondents, together with his account for brokerage "making in all the sum of 10,200 dollars. On the 18th July, 1874, the "said Thomas Kershaw sent his clerk to the said J. B. Stevenson & Co. "to get some money; the clerk received 8,000, dollars, and gave a receipt "on account of the respondent's wheat. When he returned the said "Thomas Kershaw asked him if the 8,000 dollars was on any particular

" account. The clerk replied that he thought he had given a receipt on " account of the respondent's cargo of wheat, upon which the said " Thomas Kershaw replied, " Go back and tell Stevenson." After reciting the judgment of the Court below, the Court of Queen's Bench proceed to say, " The Court here see no reason to alter the judgment of the Court " below. The imputation was made by the parties at the time the receipt " was given, and to this date this receipt remains in evidence that " Stevenson paid the $8,000 to appellant on account of amount due to " respondents."

The law of Canada with respect to the appropriation of payments appears not to differ materially from the law of this country. It is contained in the section 1,158 and the following sections of their Civil Code. Sections 1,158 is in these terms: " A debtor of several debts has " the right of declaring, when he pays, what debt he means to dis- " charge." This is very much a repetition of a similar provision in the Code Napoleon, the commentators on which paraphrase the expression " when he pays " by the expression " at the instant or the moment of " payment." Section 1,160 runs thus: " When a debtor of several debts " has accepted a receipt by which the creditor has imputed what he has " received in discharge specially of one of the debts, the debtor cannot " afterwards require the imputation to be made upon a different debt, " except upon grounds for which contracts may be avoided," which are to be found in Article 991, which declares that contracts may be avoided on the ground of fraud and error, and other grounds very similar to those on which they are avoidable in this country. Then section 1,161 says: " When the receipt makes no special imputation, the payment " must be imputed in discharge of the debt actually payable which the " debtor has at the time the greater interest in paying," and so on. The only observation their Lordships think it necessary to make upon these provisions in the Code is, that they seem to attach somewhat more importance, as indeed the Code Napoleon does, to the written evidence of an appropriation than is attached to it in this country, the object being, no doubt, as far as possible to avoid contradictions of parol evidence.

Such being the facts of this case, and the law applicable to them, their Lordships have to determine, not what decision they might have come to if they had heard the case as a Court of First Instance, but whether it has been established that the Courts below were wrong in their findings, which their Lordships regard as in a great mesure findings of fact.

Undoubtedly the evidence of Stevenson and of Benac was far from satisfactory, and it is open to argument upon that evidence that the choice of the particular invoice on which the receipt was written was merely a matter of chance, without the intention of appropriating the payment to any particular debt. But there having been a finding of

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fact in both Courts that it was the intention of Stevenson to appropriate the payment to tho debt of the plaintiff, their Lordships are unable to say that the evidence did not warrant such a finding. Assuming this intention, they agree with the Courts that upon the giving of the cheque by Stevenson, and the receipt by Benac, who was sent by Mr. Kershaw for the purpose of receiving the money, and would therefore be acting within the scope of his authority in giving the receipt, there was an appropriation of the payment to the debt of the plaintiffs.

That being so, Mr. Kershaw himself could not change the appropriation, although he appears to have desired to do so.

But it has been contended that there was a change of the appropriation by the consent of Stevenson and Kirkpatrick.

Their Lordships do not think it necessary to determine whether, considering that Kershaw received this payment on behalf of a third person, an agreement by Kershaw and Stevenson could have had the effect of changing the appropriation of the payment as against Kirkpatrick, because they concur in what they understand to be the finding of the Court of Queen's Bench, that Stevenson did not agree to any change of the appropriation of the payment. He appears to have given an evasive answer upon the Saturday, and to have spoken again evasively upon the Monday. But the fact remains that he refused to alter the receipt, and their Lordships do not think the Court wrong in attaching great weight to the fact that the receipt remained in the terms in which it was originally written.

It has been further contended, that what took place between Kirkpatrick, Stevenson and Kershaw on the Monday amounted to an agreement of all the parties to a change in the appropriation of the payment. It is true that Mr. Kirkpatrick appears to have tried to get as much as he possibly could, and to have got somewhat too much, which possibly he will have to account for to Stevenson's estate. But be that as it may, he does not appears to be made out that there was any rescision of the appropriation of payment by the consent of all parties. Their Lordships are further disposed to think that if such a defence had been set up it ought to have been specially pleaded, as the rescission of a contract is required to be by the Code of Civil Procedure, the appropriation of a payment being put upon the footing of a contract by the Canadian law.

Their Lordships think it right to say that no imputation can properly be made against Mr. Kershaw for his conduct. Considering that Mr. Kirkpatrick received the sums which he did from Mr. Stevenson, and having regard to all the circumstances, Mr. Kershaw may very well have thought that this was a case in which he was justified in taking the opinion of the Courts.

For these reasons their Lordships will humbly advise Her Majesty

that the decision of the Queen's Bench in Canada be affirmed, and this appeal be dismissed, with costs. Kershaw & Kirkpatrick et al.

Abbott, Tait, Wotherspoon & Abbott, for appellant.

Kerr & Carter, for respondents.

(J. K.)

PRIVY COUNCIL, 1875.

Montreal, 2nd March, 1875. King & Pinsonnault.

Present: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

KING *v.* PINSONNEAULT.

The judgment of their Lordships was delivered by SIR ROBERT P. COLLIER:—

In order to make this case intelligible a short narrative is necessary. General Napier Christie Burton, who possessed property in England and in Lower Canada, made his will on the 20th December, 1841 the provisions of which material to the cause are as follows:—He gave and bequeathed the lease of the house in England, in which he then resided, and all his household furniture, plate, etc., and all his other effects, together with all cash in the house at the time of his decease, together with all moneys due to him, in his own right, as well as representative and heir-at law of his late father, General Gabriel Christie Burton, to three trustees (George Burton Hamilton and William Henry King, gentlemen residing in England, and Edmé Henry, described as of Laprairie near Montreal, Lower Canada) in trust for investing the moneys collected and the proceeds of the sale of the furniture, etc., in Government stocks, and accumulating such stocks and dividends, "until" in in the words of the will, "Christian Harmer, the only child of my natural daughter, Mary Harmer, shall attain the age of 21 years, or day of marriage, whichever shall first happen, and then I do direct my said trustees, or the survivors or the survivor of them, or the executors of the survivor, to assign and transfer the whole of such accumulated principal fund or stock, and all dividends thereon, unto the said Christian Harmer for her absolute use and benefit . . . but in case the said Christian Harmer should die before attaining the age of 21 years, or being married, or the transfer of the accumulated stock being made to her, then I do give and bequeath the same unto Henry John Styrling King, the eldest son of the said William Henry King, his executors, administrators, and assigns absolutely for his or their use and benefit," and he directed his trustees to assign the same accordingly.

In a subsequent part of the will he bequeathed the residue of his estate and effects to Christian Harmer absolutely on her attaining the

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age of 21 years, but in the event of her dying under age to Henry John Styrling King.

By a codicil dated the 23rd of December, 1834, he directed Edmé Henry to sell his dwelling house and land adjoining in Lower Canada, to deduct out of the purchase money all that may be due to Henry for the expenses of the sale, and his trouble in collecting the rents of the house and of the real estates and seigniories of the testator in Canada, and then to pay over to the other trustees "the balance of such purchase money, and of all other moneys and rents due to me which have or may come into the hands of the said Edmé Henry or his heirs in manner aforesaid, in order that the balance may be invested in Government stock in England, upon and for the same trusts and persons to whom I have in the said will bequeathed the rest and residue of my estate and effects."

The testator died in January, 1835.

Christian Harmer died in April, 1847, at the age of 22 years, unmarried.

On the 31st December, 1839, Edmé Henry, the Canadian executor, with the consent of his English co-executors, sold, by deed of that date, to Pinsoneault, the defendant, a relative of his, the uncollected rents of of the seigniories of the testator in Canada for a sum of £1,999.

On the 18th of December, 1839, nearly 30 years after the above-mentioned transaction, Henry John Styrling King filed a declaration in an action against Pinsonneault and George Burton Hamilton, the last surviving executor and trustee of the testator, in which he set out the will without the codicil, averred that Christiana Harmer had died under age and unmarried, and before any transfer to her; that Edmé Henry had fraudulently concealed from his co-executors the amount of the uncollected rents due to the testator, which amounted to 50,000*l.*; that by false representations of Henry and Pinsonneault the other executors were induced to agree to the sale to Pinsonneault; he prayed that the deed of December 31, 1839, should be cancelled, that Pinsonneault should account for all the arrears with interest and profits, or in default should pay to him 480,000 dollars. On the filing of the declaration a burial certificate was filed with it, wherein it is stated that, at the time of her death, Miss Harmer was aged 22.

This action was brought when the defendant and his family were in Europe, intending to take a lengthened tour. The statement that Miss Harmer died under age is admitted by Mr. Laflamme, the Advocate and Attorney of the plaintiff, to have been false to his knowledge, and inserted in the declaration by him to prevent its being demurrable. If the plaintiff's right to sue, as it is now contended for, had been stated, viz., that, notwithstanding Miss Harmer attained her majority, nevertheless the gift over to the plaintiff took effect because no transfer had actually been made to her, the declaration might have been met by

a demurrer, upon the argument of which the plaintiff's right to sue could have been decided without an *enquête* being necessary if the decision had been against him, and the defendant's presence in Canada might not have been required. It has been suggested that the object of this false statement was to compel the plaintiff's return to Canada, to work on his fears by the respect of an inquiry into transactions thirty years old, and to drive him to a compromise. Be this as it may, Mr. Pinsonneault when he heard of the action hastened to Canada, and arrived at Montreal on the 25th of May, 1870. Communications took place between his legal advisers and those of the plaintiff, in the course of which a proposition for settling the action of 30,000 dollars was discussed. Mr. Pinsonneault, however, states that on Saturday the 4th of June he had determined to plead to the action, and had given instructions for that purpose. On that same 4th of June Mr. Laflamme obtained a foreclosure of the pleadings in the suit. The defendant, probably more alarmed than he need have been at this procedure, went to Mr, Laflamme (who had been a personal friend of his) on the Saturday morning without consulting his Attorney or Counsel, and in the course of the day the following document was drawn up by Mr. Laflamme :—

" Henry J. S. King, Plaintiff, and Alfred Pinsoneault, Defendant.

"*Memorandum.*

" It is agreed that this case is to be settled upon the following terms, viz :—

" 1. The defendant is to pay to the plaintiff thirty thousand dollars in full settlement of the action, which is to be at once desisted from, the defendant paying costs to the amount of fifty dollars.

" 2. Of the above sum of thirty thousand dollars, fifteen thousand dollars shall be paid immediately, and the remaining fifteen thousand dollars shall be invested in hypotheques, or other approved securities, in the joint names of H. Cotté and Thomas W. Ritchie, Esquires, in trust to pay the interest upon such investment during the period extending from this date to the thirty-first December, one thousand eight hundred and seventy-seyen, to the plaintiff, at the rate of five per cent, per annum, payable semi-annually, and to transfer the capital to him (the plaintiff) or his representatives at the expiration of that time, provided no action shall have been brought by the representatives of the late Christiana Harmer against Mr. Pinsoneault or his representatives for or in respect of any of the rents, monies, or matters or things mentioned in the Declaration of this cause, or under and in virtue of the will of the late General Christie ; and provided any such action has been brought, that it shall have been finally dismissed or disposed of ; and if any such action is instituted, then Mr. Pinsonneault shall pay the interest of five per cent. to the said trustees, who shall deposit the same under the above trust to await the final decision of this action.

" 3. If at the expiration of the said time (on the thirty-first Decem-

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ber, one thousand eight hundred and seventy-seven) such an action shall be pending, the capital shall only be paid upon the same being finally dismissed.

"4. If such action shall be brought within the said period of seven years, and shall be finally decided againgt Mr. Pinsoneault, the investment of the said sum of fifteen thousand dollars shall be transferred to Mr. Pinsonneault together with the interest added thereto.

"5. If Mr. Pinsoneault prefers it, the sum of fifteen thousand dollars may be deposited in any chartered bank of this city selected by him, in the names of Mr. Cotté and Mr. Ritchie, subject to the foregoing trust.

"*Montreal, June* 4, 1870.

"(Signed.) ALFRED PINSONEAULT.
R. LAFLAMME,
"*Attorney for the said J. S. King.*"

The agreement, which, in the language of the Canadian law, is termed a "transaction," though made on the 5th of June, is dated on the 4th. Mr. Laflamme, after the signing of the agreement, gave the defendant a letter addressed to Mr Cassidy, his counsel and attorney to the effect that the cause was stayed and the foreclosure removed "jusqu'à nouvel avis."

Mr. Laflamme deposes that he had authority from the plaintiff to enter into this agreement, and that he so informed the defendant; and it is manifest that the defendant at the time supposed that he had such authority.

On the next day the defendant's legal advisers satisfied him that the agreement he had made was an improvident one, and intimated their opinion that the plaintiff had no cause of action.

On the 10th of June the defendant executed a notarial instrument revoking the agreement, on the ground (among others) that it had not been accepted by the plaintiff, which instrument was served on that day on Mr. Laflamme.

On the 11th of June plaintiff wrote and sent a letter to the defendant, notifying that he was prepared to carry out the agreement and to desist from the action on the payment of the 30,000 dollars as therein provided.

From this time the plaintiff attempted to enforce the compromise, and the defendant to resist its enforcement, by all means in their power.

The defendant sought to put in pleas to the action, and succeeded in spite of the plaintiff's opposition on the ground of the settlement.

The plaintiff prayed for judgment in the action, in the terms of the compromise, but this was refused on the ground that the defendant had been admitted to plead.

In January, 1871, the plaintiff commenced a fresh action on the

agreement or "transaction" of the 5th of June, 1870, averring his own readiness to perform it, and offering to perform it, and praying that the defendant might be compelled to perform it. This action is the subject matter of the present appeal.

The main grounds of defence raised by the pleas to the action were in substance—

1. That the action was not maintainable during the pendency of the original action, because they were for substantially the same cause; or, if that were not so, that the discontinuance of the first action was a condition precedent, under the "transaction," to the bringing of the second.

2. That the proceedings by which the defendant had been admitted to plead in the original action, and the motion of the plaintiff for judgment in terms of the compromise had been rejected, were, in effect, a judgment adverse to the plaintiff's right to enforce the "transaction."

3. That the "transaction" was not intended to be final, but to be conditional on its ratification by the Court.

4. That Mr. Laflamme had not authority to make it.

5. That the defendant was entitled to be relieved from it on the ground of mistake or surprise or fraud.

The three last, with some other grounds, were taken by the same (the third) plea.

These questions, after a multiplicity of pleadings and interlocutory proceedings which it is needless to particularize further, came before the Superior Court, when judgment was pronounced by Mr. Justice Beaudry.

That judgment is to the effect that the pendency of the first suit is not a bar to the maintenance of the second, and that the defence in the nature of *res judicata* raised by the second plea also failed, but that the suit should be dismissed on the ground that Mr. Laflamme had not sufficient general authority, as Attorney and Counsel in the case, to bind his client by the agreement in question, and that no special authority had been proved, and that the ratification by the plaintiff of the 11th of June after the defendant's repudiation of the 10th, was too late.

On the appeal to the Court of Queen's Bench that Court held—

1. That the second action was not maintainable as long as the first was pending.

2. That, although the plaintiff might have enforced the "transaction" in the first action, he had not done so by the proper pleading.

The reasons of this Judgment are thus stated by Chief Justice Duval:—

"I express no opinion on the validity of the settlement pleaded, but I hold that no separate action can be brought on it, *pending* the first action instituted. King ought to have discontinued his first action brought, before instituting the present, or to have pleaded this as an *incident* to the first."

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The Court thereupon confirmed the Judgment of the Court below but not for the reasons therein alleged, " reversing liberty to the defendant to resort to any means he may be advised for the purpose of putting in force the transaction. "

In giving this Judgment the Court was far from being unanimous. Judges Taschereau and Monk dissent from it, holding that the action was maintainable, and the Plaintiffs were entitled to succeed upon the merits. The judgment is that of Chief Justice Duval, Judges Polette and Badgley, the latter of whom, though subscribing to the judgment, and holding that the action was not maintainable pending the former action, doubtted whether "the transaction" was not properly pleaded in the first action. and, expressing a regret in which their lordships sympathize, that the Court having all the evidence before them for deciding the merits should feel themselves unable to do so, gives his own opinion in favor of the defendant.

Their lordships concur with the Superior Court and with Judges Taschereau and Monk that the pendency of the first action was not a bar to the institution of the second.

The actions were not for the same cause. The first action was brought against Pinsoneault and Hamilton, for the purpose of setting aside a deed of 1839, and obtaining an account of the full amount of the sum received by Pinsoneault with payment thereof; or, in default of such account and payment for damages. The second action was brought against Pinsoneault alone to enforce an agreement of 1870, and not only to obtain payment of a sum of money, but to enforce the settlement of another sum upon trusts wholly outside of and collateral to the first action. Nor was the discontinuance of the first action a condition precedent under the agreement to enforcing that agreement by action. The performance by the parties of their parts of the agreement respectively, were, in their lordship's opinion, concurrent conditions, and this being so, it was sufficient for the plaintiff to aver in his declaration that he had been and was ready and willing and that he offered to perform his part, viz., discontinuance of the first action on the defendant performing his part of the agreement. Their lordships are further of opinion that he has no made step inconsistent with this averment, and they find that it is proved in fact.

Although the form of procedure differs in England and Canada, some observations of the vice-chancellor Turner in Askey v. Wellington (9 Hare, 65) are applicable in principle and in reason to the present suit. The vice-chancellor observed that some which he referred to " appear to establish that, at least in cases where the compromise goes beyond the ordinary range of the court in the existing suit, and the right to enforce the agreement in that suit is disputed, the proper course of proceeding for enforcing it is by bill for specific performance. and not by motion or petition in the original suit to stay the proceed-

ings, and I think that *à fortiori*, this must be the case where the agreement itself is disputed." It may be collected that the putting an end to the original suit in that case was not deemed a condition precedent to instituing the second.

It becomes, therefore, unnecessary to decide whether or not the plaintiff could have enforced the "transaction" in the first action, or whether, if he could, he has taken the proper steps for doing so.

For these reasons their lordships are of opinion that the Court of Queen's Bench were wrong in declining to give judgment on the validity of "the transaction;" it becomes, therefore, their lordships' duty to determine this question, and to give the judgment which ought to have been given by the court of Queen's Bench.

The objection that the "transaction" was not intended to be final, but was subject to some act of confirmation by the Court, is not noticed by Mr. Justice Beaudry, who seems to have thought his finding on the want of authority sufficient to establish the third plea and to dispose of the suit. Their Lordships have no doubt that it was intended to be final.

The next important question that arises is whether or not Mr. Laflamme had authority to bind his client by it.

This question again divides itself into two:—1. Had Mr. Laflamme such authority by reason of his being counsel and attorney (avocat and avoué) in the case?

2. If not, had he express authority from the plaintiff?

Their Lordships do not consider it necessary or desirable for the determination of the first of these questions, to inquire into the extent of the authority to settle causes of counsel, attorneys or proctors, in this country, founded, as it is, upon laws and customs in a great degree peculiar to ourselves. The law on this subject must be looked for in the Canadian Code, interpreted, if its provisions are obscure, by the aid of what light can be thrown upon them by the French law.

Mr. Justice Badgley, in his learned judgment, intimates an opinion (as their Lordships understand him) that the "transaction" was invalid, because it was not given effect to by a "jugement d'expédient," and in support of this view he quotes the following passage from Pigeau (1) Procedure Civile, pp. 9 and 359):—"On peut transiger en justice en passant un jugement de concert qui ordonne ce dont les parties sont convenues; cela se fait très fréquemment au Chatelet de Paris où l'on appelle cette voie expédient. On dresse le dispositif du jugement sur papier ordinaire, les procureurs le signent et le font signer à leurs clients *lorsqu'ils n'ont pas de pouvoir de ceux-ci*, et ne veulent pas prendre sur eux de signer sans pouvoir, à cause de l'importance de l'affaire."

The "transaction" by "judgment d'expédient" with its formalités which was only one form of "transaction" according to the French law, has not been adopted or recognized in the Canadian Code, which

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does not require that a " transaction " shall be in any particular form, even if it consists in assenting to a judgment. The passage from Pigeau, however, is not unimportant as bearing on the general authority of procureurs—for, if they have not authority to consent to a judgment, it may be argued that they cannot have the power to settle a cause, and to abandon or compromise the rights of their clients without one.

Mr. Laflamme was both " avocat " and " avoué." It does not appear, however, that the law gives him any greather authority in his former than he had in his latter capacity. If he had any power analogous to that of a counsel in England, to settle a cause " in Court," it is enough to say that it was not this power which he exercised; his power was merely that of an " avoué ".

No French authority has been cited which goes the length of asserting that an " avoué " has a general power to bind his client by a " transaction " such as the present, and some French authorities have been cited which it is contended establish the negative of this proposition.

Much reliance has been placed by the Counsel for the defendant on a passage from Dalloz's " Répertoire de Jurisprudence " (Transaction, Art. 4, s. 57), which runs thus :—

" Un mandataire a-t-il le droit de transiger au nom de son mandat? La négative résulte clairement de l'Article 1988, Code Nap., à moins que la procuration ne confère expressément ce pouvoir au mandataire. Le mandataire chargé pour une seule affaire ne peut transiger sans un pouvoir exprès."

Article 1988 of the " Code Napoléon " is almost identical with Article 1703 of the Canadian Code, which is in these terms :

" The mandate may be either special for a particular business, or general for all the affairs of the mandator. When general it includes only acts of administration. For the purpose of alienation or hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express."

It has been argued that if the inability declared by the French Code to alienate and hypothecate without express powers carried with it the inability to " transact, " the same words in the Canadian Code must have the same effect.

The plaintiff seeks to explain this passage as referring only to the powers of ordinary mandatories, and having no reference to " avoués, " who are mandatories with extraordinary and exceptional powers. If, however, a class of mandatories so well known do possess this exceptional power, the omission of all notice of it in the place where notice of it would have been appropriate, or, indeed, in any part of the exhaustive treatise of Dalloz concerning " transaction, " is not a little remarkable.

The same doctrine is laid down in other books of authority.

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In Guyot's " Répertoire de Jurisprudence " (Vol. 17, transaction, p. 235) this is said :—

" Un procureur ou mandataire peut-il transiger au nom de son commettant ? Il le peut sans difficulté, si la procuration lui eût donné expressément le pouvoir ; mais dans le cas contraire toute espèce de transaction lui est interdite. "

The same doctrine is laid down by Troplong (" droit Civil Expliqué, " sec. 295), and by other writers on French law, without the supposed exception being ever noticed.

Undoubtedly " avoués " possess some powers beyond those of ordi nary mandatories of binding their principal unless acts are expressly disavowed.

This subject is treated of at some length in Dalloz's Répertoire de Jurisprudence " (Désaveu, Section 3, Article 25), where many instances of such powers are given, not, however, including the power " to transact." It is also treated more succinctly in Dalloz's " Dictionnaire de Jurisprudence," tit. Désaveu. It is there said that in general every act of a mandatory is void which exceeds the bounds of his mandate, but that it is otherwise with mandatories *ad litem*, who are in some sense officers of justice representing citizens before the tribunals in the exercise of their profession. He thus sums up the law : " en effet, jusqu'à désaveu tout acte de ministère de l'avoué, mandataire *ad litem*, quelles que soient les conséquences qu'il entraîne, est réputé fait en vertu du pouvoir de sa partie. "

It appears to their Lordships that full effect may be given to the meaning of these expressions by treating the " avoué " as able to bind his client (until " désaveu ") by any *proceeding in the cause*, though taken without his client's authority, or even in defiance of his prohibition. The plaintiff is assumed to have authorized every claim made on his behalf in the declaration, the defendant every plea pleaded for him ; for example, a plea of the statute of limitations, or a plea justifying a libel—though he may have prohibited their being pleaded. An illustration of this doctrine is afforded in the present case, where the plaintiff must be taken to have authorised his claim being based on a false statement of the age at which Miss Harmer died, although he may possibly have disapproved of it. Such would appear to be the view taken of this subject by the framers of the Canadian Code of Procedure, Article 195 of which is in these terms :—

" A disavowal can only be made by the party himself or his attorney, under a special power, and the party himself must declare that he did not authorise the *act of procedure* which he repudiates."

Their Lordships are of opinion that to enter upon an agreement such as " the transaction " in question, which was in a great measure collateral to the cause, and was capable of being made the subject-matter of a separate suit, cannot be properly termed an act of procedure in he cause.

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Their Lordships have not discovered in the Canadian codes any provision conferring upon "avoués" the power of entering into transaction if they did not before possess it. The subject of "mandate" is treated of under the 8th title in five chapters.

Article 1703, which has been above referred to, applied to all mandatories, general and special.

Article 1704 is in these terms :—

"The mandatory can do nothing beyond the autority given or implied by the mandate. He may do all acts which are incidental to such authority and necessary for the execution of the mandate."

And the application of this rule to professional men of various classes, including "avoués," is provided for by Article 1705—

"Powers granted to persons of a certain profession or calling to do anything in the ordinary course of the business which they follow need not be specified, they are inferred from the nature of such profession or calling."

The only mention of "avoués" in the chapter is contained in Article 1732 :—

"Advocates, attorneys, and notaries are subject to the general rules contained in this title ("mandat") in so far as they can be made to apply. The profession of advocate and attorney is regulated by the provisions contained in an Act intituled 'An Act respecting the Bar of Lower Canada,'

It has been admitted that the power contended for is not to be found in this Act.

There are nine articles in the Code under the head "transaction," none of which appear to have any material bearing on the subject now under discussion.

It does not appear to have been the intention of the framers of the Code to invest "avocat" or "avoués" with any new or exceptional powers, but rather to apply to them the general law with respect to mandatories as far as it was applicable.

In their Lordships' opinion Mr. Laflamme had not authority, by reason of his being "avocat" and "avoué" to bind his client by this "transaction."

If this be so, the next question is whether any special authority to make this "transaction" has been proved ? It has been admitted that such special authority need not have been in writing.

The evidence relied upon by the plaintiff on this subject is to be found in an affidavid made by Mr. Laflamme in the original suit, which may be referred to inasmuch as it has been put in evidence by the plaintiff, in which Mr. Laflamme states :—"The defendant then and there signed the same (the transaction), together with this deponent, on behalf of plaintiff, *by whom he was fully authorized.*" And in his deposition as a witness for the defendant, "Je lui dis alors ce que mon client consentirait à accepter, que j'étais autorisé à règler sur ces bases."

No questions were put to Mr. Laflamme by the plaintiff.

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In their Lordships' opinion these allegations are consistent with a belief which Mr. Laflamme may have *bonâ fide* entertained, that his character of "avoué" gave him authority to conclude the "transaction" Mr. Laflamme must have been aware of the importance to his client of proving a special authorization, and if such had been given, he might and probably would have been called by the plaintiff to prove it. Called by the defendant, he might still have proved it by putting in the written authority, if the authority were in writine, or, if it were given by a verbal communication, by stating the effect of that communication, and where and when it was made. But Mr. Laflamme makes no mention of any special authority, and in absence of such mention their Lordships cannot assume it.

There being no evidence of special authority, it becomes unnecessary to deal with the argument on the part of the defendant, that, although the special authority need not have been in writing, still that the proof of it, or, at all events, the commencement of proof, must have been in writing, and that no such commencement has here been shown.

It has been contended further, on the part of the plaintiff, that even assuming Mr. Laflamme not to have been authorized, still the defendant, having treated him as authorized, could not recede from his agreement, until a reasonable time had elapsed for the ratification of Mr. Laflamme's act by his principal; and, in support of this proposition a passage from Toullier has been quoted. It is enough to say that, assuming this to be Canadian law, of which their Lordships are by no no means satisfied, in their opinion more than a reasonable time for ratification of the "transaction" by the plaintiff had elapsed, before it was repudiated by the defendant.

The decision which their Lordships have come to on the question of authority disposes of the cause. It therefore becomes unnecessary to determine the further question which would have arisen had their decision on this point been otherwise, whether the defendant is entitled to relief from the agreement on the ground of mistake, surprise, or fraud, and their Lordships are spared a somewhat painful investigation into many circumstances which it has been unnecessary to notice

Their Lordships will humbly advise Her Majesty to reverse the Judgment of the Court of Queen's Bench, except so far as it affirms that of the Superior Court and condemns the appellant in the costs of the Appeal; and to direct that that Appeal do stand dismissed and the Judgment of the Superior Court affirmed in all respects with the costs of this Appeal.

Mr. ***Fry***, Q. C., and Mr. *H. A. Giffard*, Q. C., for appellant.

Mr. ***Bompas*** and Mr, *Kenelm Digby*, for respondent.

Lambkin & South Eastern Railway Company.

PRIVY COUNCIL, 1877.

12th December, 1877.

PRESENT: THE QUEEN'S MOST EXCELLENT MAJESTY, LORD PRESIDENT, LORD PRIVY SEAL, EARL OF DERBY, MR. SECRETARY CROSS, MR. TRESIGER.

PHILO LAMBKIN *v.* THE SOUTH EASTERN RAILWAY COMPANY.

In February, 1875, P. Lambkin instituted an action before the Superior Court, Montreal, against the S. E. Railway Company, for the recovery of $50,000 damages suffered from the injuries sustained by him on or about the 13th August, 1874, through the negligence of the defendants whilst travelling on their line of railway. On the 13th Sept., 1875, the cause came up before a Special Jury, which unanimously awarded the plaintiff a verdict assessing his damages at $7,000. On the 23rd Sept., 1875, the plaintiff made a motion before the Court of Review for a judgment in conformity with the verdict. The Court of Review unanimously granted this motion, entered judgment on the verdict, and rejected the defendant's motion asking for a new trial. The defendants appealed to the Court of Queen's Bench from that judgment, and on the 16th March, 1877, the Court of Appeal reversed the judgment of the Court of Review and ordered a new trial. On the 11th June, 1877, the plaintiff moved the Court of Queen's Bench for leave to appeal to Her Majesty in Council. This motion was rejected on the 15th June, the Court giving, as the reason of its refusal, that the judgment of the Queen's Bench was an interlocutory judgment, from which there could be no appeal to the Privy Council.

The appellant then applied directly to the Privy Council for special leave to appeal.

The Lords of the Committee having reported to Her Majesty as their opinion that leave ought to be granted to appellant to enter and prosecute his appeal from the judgment rendered on the motion of the defendants for a new trial.

Her Majesty was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order that the said Philo Lambkin be allowed to enter and prosecute his said appeal, upon depositing in the registry of the Privy Council the sum of £300 sterling, as security for the costs of the respondents, in case the appeal should be dismissed, and the registrar of the Court of Queen's Bench at Montreal is hereby directed to transmit to the registrar of the Privy Council, without delay, authenticated copies of the record, etc., etc.

Appeal allowed.

PER CURIAM. This is an action brought against the South-Eastern Railway Company of the Province of Quebec to recover damages which the plaintiff sustained by reason of an accident to a train in which he was a passenger. The plaintiff obtained a verdict with damages $7,000.

The Railway Company, applied to the Superior Court of Montreal for a new trial upon a number of grounds, including misdirection, the verdict being against evidence, and the damages being excessive. That Court unanimously expressed themselves satisfied with the verdict, and refused a new trial. Upon this the defendants appealed to the Court of Queen's Bench. The Court of Queen's Bench, as their Lordships understand, expressed their approval of the verdict, or, at all events, expressed no disapproval of it upon any ground except that of excessive damages; and upon that ground alone directed a new trial. From that judgment of the Court of Queen's Bench the present appeal is preferred.

It has been sought to uphold the judgment upon grounds other than that on which it was pronounced—viz., that the verdict, in as far as it finds negligence on the part of the Company, is against evidence, and that the judge misdirected the jury. With respect to the verdict being against evidence, it appears to their Lordships, as indeed they have before intimated, that the question of negligence, being one of fact for the jury, and the finding of the jury having been upheld or at all events not set aside by the two Courts, is not open under the ordinary practice to the defendants. However, the defendants have argued, as they had a right to argue, the question of misdirection; and the direction of the learned Judge cannot be considered altogether apart from the evidence to which it applies.

Without going at length through the evidence, it is enough to say that the plaintiff was a passenger on the 13th of August, 1874, on the defendants' railway, and that the accident occurred at a point between the station of Abercorn and the station of Sutton, the distance from one to the other being about 5½ miles; that the line between the two stations is intersected by a number of streams, which are all spanned by bridges, and at times, perhaps generally, contain but little water, but are apt to be flooded after storms. It appears that on the evening before the accident, the 12th August, a violent and most unusual storm had occurred, perhaps in the nature of a water-spout, which carried away five of the six bridges between the two stations. The next morning, at half-past six, the train in which the plaintiff was travelling dashed into the bed of one of these streams, of which the bridge had been demolished, without any warning whatever having been given to the driver of the train. The result was that some persons were killed and many injured—the plaintiff among them. It was the duty of four men, headed by one who is sometimes called "the boss," to look after the railway between these two stations, a part which would appear to require more than usual care and attention. It was the duty of these men, upon the occurrence of the storm, and some of the bridges being washed away to their knowledge on the previous evening, to use all exertions in their power to stop the train which was coming in the morning. Of two of these men we hear nothing. A third, Doran, who lived at a house rather

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more than a mile from Sutton, was called; and he speaks of a bridge close to his house being carried away, and of his apprehension that other bridges would be carried away, and says that upon starting on the line in the direction of the Abercorn station in the morning at about four o'clock he was unable to proceed. He then went to the Sutton station, and requested the station-master to telegraph to Abercorn, but it was ascertained that the telegraphic communication was interrupted. Doran who had borrowed a horse, returned to his own house and planted a flag at the place where the bridge opposite to his house had been demolished; but instead of riding on to ascertain the state of the bridges between his house and Abercorn, he put the horse up and contented himself with remaining where he was. It appears to their Lordships that the jury might have come to the conclusion fairly upon the evidence, that if he had ridden on he might have arrived at the place where the accident occurred in time to stop the coming train. White, the foreman or "boss," was not called. He appears to have done but little. He was aware, according to some evidence, that one of the bridges had been washed away as early as four o'clock in the morning. He appears to have made no effort to go beyond the bridge at Doran's house. The time he arrived there is not very clearly fixed. If it was, as Doran says, at a quarter before six, he would have had time to stop the coming train, which, although due before, did not arrive till half-past seven. Whether he was there at the time or not, it appears to their Lordships that upon the evidence the jury were warranted in the conclusion that he was guilty of negligence.

The summing up of the learned Judge must be taken with reference to the circumstances of the case and to the evidence. The following passage has been picked out and objected to: "First of all, was "there time to give notice? That, of course, is easily answered; there "was time. Then, was there a possibility of doing it? That is the ques- "tion." Their Lordships have read through the summing up of the learned Judge; and although he may not have explained the law quite as clearly or fully as might have been desired, they are unable to see that he has misdirected the jury. He appears to have put them as a question of fact whether there was time for either of the men to have got to to the place of the accident so as to stop the train; and further, whether, if there was time—that is, if there had been time under ordinary circumsiences—there were physical obstacles, such as the unusual depth of the intervening streams, which would have prevented it; for, undoubtedly, during a portion of the night all the streams were so deep as to be scarcely passable, whereas in the morning the mountain flood had subsided almost as rapidly as it had arisen. The duty of the servants of the Company must be taken with reference to the emergency; and the jury might be properly told that those persons who had charge of the line ought, and were bound, to do all they could to stop the train

which was rushing on destruction. It appears from the summing up, taken as a whole, that the learned Judge, when using the word "possibility," meant to put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case. Their Lordships, therefore, are of opinion that there was no misdirection. Lambkin & South Eastern Railway Company.

We now come to the question whether the damages were excessive. It appears that the plaintiff was found soon after the accident with his head jammed between two pieces of timber; that it took two or three men to release him, which was done by cutting away the timber; that he was then conveyed to Richford, a place at no great distance, and was attended to by two or three surgeons, among others, by a surgeon of the company. The surgeon who first saw him, or at all events who saw him very soon after the accident, is a Mr. Fassett, who thus describes his injuries:—"The wounds upon the face were—a cut upon the right side of "the lower jaw; and above that, near the ear, there seemed to be a "bruise. Upon the forehead, near the right, was a cut; it seemed to "be simply a cut. Over the left eye there was a severe bruise, which "seemed to have been caused by pressure rather than a blow. That was "the idea it gave me on examining it. The wound on his thigh was a "lacerated and punctured wound. He lay upon the bed, apparently "not noticing things around him, restless, tumbling about, not heeding "anything apparently that was going on." He goes on to say that the man was from time to time delirious, and adds:—"I think I gave an "opinion at the time at Richford that his condition was dangerous then, "and if he recovered at all he would probably not fully recover, and I "am still inclined to favor that opinion." He attributes the injury of the brain to pressure, his theory being that the two sides of the skull were to a certain extent pressed together. The plaintiff was attended by Mr. Hamilton, a surgeon employed by the company to take care of the wounded, and he gives a description of the state of the plaintiff not materially different from that of the last witness. He says the plaintiff was delirious for two or three weeks when he attended him; that he was subsequently removed, and that he had seen but little of him between the time of the accident and the time of the trial, which was just twelve months. He expresses no very confident opinion about his state. He thinks he may recover, but will not undertake to say that he will, or to fix any probable time for the recovery. We have further the evidence of Dr. Gibson, the medical attendant of the plaintiff, who speaks of him as being in a very dangerous state at Richford, so dangerous that at one time his life was despaired of. He does not speak to having attended him very much subsequently, for his physical health appeared to have improved, and he says very candidly that he thought medicine would do him little good; but he speaks to having had a conversation with him shortly before the trial, from which it would appear that his brain was still affected; not that he was idiotic or insane, but that his

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conversation was rambling, and that he was unable to fix his ideas upon any subject or to attend to business. This witness also declines to give an opinion as to whether the man would ever thoroughly recover, although possibly he might recover.

There is a considerable body of evidence. The plaintiff calls his brother, his cousin, and some neighbors, the effect of whose evidence may be shortly stated to be that the plaintiff was in partnership with his brother, the plaintiff being the elder and the more active partner; that they carried on business as builders, and that the plaintiff did the work of an architect,—was capable of designing a house or public building and seeing to the execution of his design; that they carried on business as manufacturers of cabinet and other articles; that the plaintiff also, being an active and industrious man from time to time charged $3 or $4 a day for his own work, in addition to the profit on the work of the laborers he employed and on his materials; and that the two brothers were making some $5,000 or $6,000 a year. The evidence, though not perhaps as conclusive as might be desired on this subject, is to the effect that the business had to a certain extent suffered. The brother said that he had to refuse some orders which otherwise he would have accepted; there is evidence on his part, and also that of the neighbors, of the business having fallen off; it is obviously probable that the business would fall off, more perhaps in future years that at once. There is further evidence that the plaintiff, although before the accident a strong vigorous man, with much capacity for business, became incapacitated for business; that he was weak and languid in physical health, and unable to fix his attention continuously upon one subject, from the time of the accident up to the time of the trial. One witness, a director of the company, who can scarcely be supposed to be biassed against them, says: "I have tried to talk business with him lately. I did not "find him the same man that he used to be. If he goes to talk about "business, he wanders directly and he gets astray. I cannot say but "this must affect his fortune. He has not been engaged in building "since the accident. I do not think he was able to do so."

On the part of the Company Dr. Scott was called, who said he did not think that the symptoms complained of by the plaintiff could arise from compression of the skull, inasmuch as he thought that, at the age of the plaintiff, the skull would not be compressible without fracture. The further effect of his evidence appears to be that he thought, from the description which he had heard of the injuries, that the plaintiff ought to have recovered; therefore that he had recovered, and therefore that he must be feigning illness. He says that, without having seen the plaintiff, he is as confident in his opinions as if he had seen him. a confidence which appears to their Lordships to contrast unfavorably with the caution with which the evidence of the other medical men is given.

Assuming the jury to have believed the evidence on the part of the

plaintiffs, their Lordships think that they would have been wrong if they had confined the damages, which they had to assess once and for all, solely to what the plaintiff had lost at the time of action brought or at the time of the trial; that it was their duty to take into consideration that the plaintiff had been disabled for twelve months; that he had not then recovered, and that it was doubtful, according to the best evidence, whether he would recover at all, or if he did recover, when he would recover; and although an estimate of future damages must necessarily be of somewhat rough and speculative character, still they were bound to give him some damages in respect of the future loss which he would sustain.

The learned Judges appear to have directed a new trial upon the supposition that the jury only gave damages in respect of what the plaintiff had lost at the time either of action brought or of the trial, and that those damages are excessive. Such is the view certainly of Mr. Justice Sanborn, who says: "It is impossible that three or four weeks' "illness and more or less loss of time for some months of a man who "earned four dollars a day could occasion a loss of $7,000." Their Lordships may observe that Mr. Justice Sanborn seems not to have been quite correct in estimating the loss of the plaintiff as of a mere labourer who earned $4 a day, inasmuch as the evidence is that the plaintiff not only earned $4 a day in addition to the profit upon his workmen and materials, but carried on business as a manufacturer. It appears to have been inferred that the jury itended to assess damages only up to the time of the trial, from their answer to one of the questions put to them in the articulation of facts. But their Lordships are by no means satisfied that such was the intention of the jury. They are first asked:—"Has the plaintiff ever since the said accident been disabled from "doing business, and to what extent is he disabled from attending to "business? Answer.—He has been disabled up to the present time;"—that is to say, they did not think him cured. Then the question is put, which divides itself into three:—"Is the plaintiff the head of a "family composed of his wife and three children? Are they all depen- "dent upon his labour for their maintenance? Have they ever since "been deprived of his labour, and to *what extent in the future will they* "*be deprived of his labour!* Answer.—He is the head of a family con- "sisting of a wife and three children; one, a son is not dependent; "wife and two girls dependent." The answer to the second part of the question is:—"They have been deprived;" and the third, the jury answer that they could not form a judgment.

Their Lordships scarcely understand on what principle this question should have been put to the jury. The question in the cause was not what damage has been sustained by the plaintiff's wife and children, but what damage had been sustained by himself. If he had been killed, and such an action as that brought under Lord Campbell's Act in this

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country could be maintained in Canada, then the question would be what damage was sustained by his wife and children. But the jury are further asked, "To what extent in the future will "the wife and children be deprived of his labour?" It had been originally proposed to put the question in the form:—"For what time, under "probable circumstances, or in all probability, "would they be deprived?" But on the defendants' objection the question stands in its present form, and the jury are required to fix the time when the plaintiff will recover. They declined to do what no witness, medical or otherwise, had attempted, but their Lordships did not therefore infer that when they answer the further question, "Has the plaintiff suffered damages by the said "accident, and, if so, to what amount?" they excluded all consideration of future loss. If they had thought that the plaintiff would be disabled for all the rest of his life, in their Lordships' view the damages would be too small: but if they adapted the intermediate view, which seems to be, on the whole, the result of the evidence of the plaintiff's witnesses, medical or otherwise, that the plaintiff had been seriously injured, that he still continued to suffer, that his brain still continued somewhat affected, that he was unable to attend to business, and that it was uncertain whether he would ever recovor, although he might recover, their Lordships feel unable to say that the damages given were so excessive as to justify a new trial upon that ground. They observe that the law of Canada, as expressed by the article 426, section 11, is not far different from that of this country upon this subject: "If the amount "awarded be so small or so excessive that it is evident the jury must have "been influenced by improper motives, or led into error," then a new trial must be granted. On the whole, their Lordships are by no means satisfied that the damages are of such an excessive character as to show that the jury have been either influenced by improper motives or led into error and they are of opinion that there ought to be no new trial.

Therefore, their Lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench be reversed, that the judgment of the Superior Court of Montreal be affirmed, and that the Appellant have the costs of the Appeal in Canada and of the Appeal to Her Majesty in Council.

IN THE PRIVY COUNCIL.

9th July 1887.

Before LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK and SIR RICHARD COUCH.

THE BANK OF TORONTO *et al* v. LAMBE.

Lord Hobhouse delivered judgment in the above joint appeals, dismissing the appeals with costs.

His Lordship said: These appeals raise one of the many difficult questions which have come up for judicial discussion under those provisions of the British North America Act (1867) which apportion legislative powers between the parliament of the Dominion and the legislatures of the provinces. It is undoubtedly a case of great constitutional importance, as the appellants' counsel earnestly impressed upon their lordships. But questions of this class have been left for the decision of the ordinary courts of law, who must treat the provisions of the act in question by the same methods of construction and exposition which they applied to other statutes.

A number of incorporated banks are resisting payment of a tax imposed by the legislature of Quebec, and four of them are the present appellants. Dealing first with the case of the Bank of Toronto, which was argued first,—in the year 1882 the Quebec legislature passed a statute intituled "An act to impose certain direct taxes on certain commercial corporations," by which it was enacted that every bank carrying on the business of banking in the Province, every insurance company accepting risks and transacting the business of insurance in the province, every incorporated company carrying on any labor, trade or business in the province, and a number of other specified companies, should annually pay the several taxes thereby imposed upon them. In the case of banks the tax imposed was a sum varying with the paid-up capital, and an additional sum for each office or place of business.

The appellant bank was incorporated in the year 1855 by an act of the Parliament of Canada. Its pricipal place of business is at Toronto, but it has an agency at Montreal. Its capital is said to be kept at Toronto, from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the province of Quebec, and the amount disposable to the Montreal agency, are respectively much less than the amount disposable elsewhere.

The bank resisted payment of the tax in question on the ground that the Quebec legislature had no power to pass the statute which imposed it. Mr. Justice Rainville, sitting in the Superior Court, took that view, and dismissed an action brought by the Government officer, who is the present respondent. The Court of Queen's Bench, by a

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majority of three judges to two, took the contrary view, and gave the then appellant (the present respondent) a decree. The case comes on appeal from that decree of the Court of Queen's Bench.

The principal grounds on which the Superior Court rested this judgment are as follows:—That the tax was an indirect one; that it was not imposed within the limits of the province; that the Parliament had exclusive power to regulate banks; that the provincial legislature could tax only that which existed by their authority, or was introduced by their permission; and that if the power to tax such banks as this existed, they would be crushed by it and so the power of the Parliament to create them would be nullified.

The grounds stated in the decree of the Queen's Bench are two, viz: That the tax was direct, and that it was also a matter of a merely local or private nature in the province, and so fell within clause 16 of provincial legislation.

It was contended at the bar that the provincial legislature could tax only that which existed on their authority or permission, and when the appellants' counsel were proceeding to argue that the tax did not fall within clause 16, their lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds had been argued very fully and very ably at the bar. To ascertain whether or not the tax was lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of section 42 of the Federation act, viz: "Direct taxation within the province in order to the raising of a revenue for provincial purposes?" Secondly, if it does, are we compelled by anything in section 91, or in the other parts of the act, so to cut down the full meaning of the words of section 92 that they should not cover this tax?

First, is this tax a direct tax? For the argument of this question the opinions of a great many writers on political economy were cited: and it is quite proper—or, rather necessary—to have careful regard to such opinions. But it must not be forgotten that the question is a legal one, viz., what the words mean as used in this statute; whereas economists were always seeking to trace the effect of taxation, throughout the community, and were apt to use the words "direct" and "indirect" according as they found the burden of a tax abided more or less with the person who first paid it. This distinction was illustrated very clearly by quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving this test of direct and indirect taxation, made remarks to the effect that a tax may be made direct or indirect, by the position of the tax payers, or by private bargains about its payment.

Doubtless such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax, that it affects

persons other than the first payers; and the excellence of an economist's definition would be measured by the accuracy with which it contemplated and embraced every incident of the thing defined; but that very excellence impairs its value for the purposes of the lawyer.

The legislature could not possibly have meant to give a power of taxation, valid or invalid, according to its actual results in particular cases. It must have centemplated some tangible dividing line, referable to and ascertainable by the general tendencies of the tax, and the common understanding of men as to those tendencies. After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by, which was: "Taxes are either direct or indirect: A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs;" and "the producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a particular contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It was said that Mill added a term that, to be strictly direct, a tax must be general; and that condition was much pressed at the bar. Their lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what Mill did say on that point; nor will they presume to say whether, for economical purposes, such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Their lordships would take Mill's definition, therefore, as a fair basis for testing the character of the tax in question, not only because it was chosen by the appellant's counsel, nor partly because it was that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seemed to them to embody with sufficient accuracy for this purpose the understanding of the most obvious *indicia* of direct and indirect taxation, which was a common understanding, and was likely to have been present to the minds of those who passed the Federation act.

Now, whether the probabilities of the case, or the Quebec act, be considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporation from whom the tax was demanded should pay and finally bear it. It was carefully designed for that purpose. It was not like the Customs duty, which

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entered at once into the price of the taxed commodity. There the tax was demanded of the importer, while nobody expected or intended that he should finally bear it. All scientific economists taught that it was paid, and scientific financiers intended that it should be paid by the consumer; and even those who did not accept the conclusions of the economists, maintained that it was paid and intended to be paid by the foreign producer. Nobody thought or intended that it should be paid by the importer, from whom it was demanded. But the tax in question was demanded directly from the Bank, apparently for the reasonable purpose of getting contributions for Provincial purposes from those who were making profits by Provincial business. It was not a tax on its profits nor on its several transactions; it was a direct lump sum, to be assessed by simple reference to its paid-up capital and its place of business. It might possibly happen that in the intricacies of mercantile dealings the Bank might find a way to recoup itself out of the pockets of its Quebec customers, but the way must be an obscure nnd circuitous one; the amount of recoupment could not bear any direct relation to the amount of tax paid, and if the bank did manage it, the result would not probably disappoint the intention and desire of the Quebec Government.

For these reasons their Lordships hold the tax to be direct taxation within class 2 of section 92 of the Federation act. There is nothing in the previous decisions on the questions of direct taxation adverse to this view. In the case of *Attorney General for Quebec pro Regina* and *The Queen Insurance Co.*, 3 App. Ca. 1090, the disputed tax was imposed under cover of a license to be taken out by the insurers; but nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under class 9 of section 92, which related to licenses. In *Attorney General for Quebec* and *Reid*, 10 App. Ca. 141, the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most instances, would certainly not be paid by the person first chargeable with it. In *Severn* and *The Queen*, 2 Supreme Court of Canada, page 70, the tax in question was one for licenses, which by a law of the Legislature of Ontario were required to be taken for dealing in liquors, and the Supreme Court held the law to be *ultra vires*, mainly on the grounds that such licenses did not fall within class 9 of section 92, and that they were in conflict with the powers of Parliament under class 2 of section 91. It is true that all the judges expressed opinions that the tax, being a license duty, was not a direct tax. Their reasons did not easily appear. But as the tax now in question is not, either in substance or in form, a license duty, further examination on that point iis unnecessary.

The next question is whether the tax was taxation within the province. It was urged that the bank was a Toronto corporation, having its domicile there, and having its capital placed there; that the tax was on the capital of the bank, that it must therefore fall on a person or persons, or property, not within Quebec. The answer to that argument was that class 2 of section 92 did not require that the persons to be taxed by Quebec were to be domiciled, or even resident, in Quebec, Any person found within the province might legally be taxed there, if taxed directly. The bank was found to be carrying on business there, and on that ground alone it was taxed. There was no attempt to tax the capital of the bank any more than its profits. The bank itself was directly ordered to pay a sum of money; but the legislature had not chosen to tax every bank, small or large, alike; nor to leave the amount of tax to be ascertained by variable accounts, or any uncertain standard. It had adopted its own measure, either of that which it was just the banks should pay, or of that which they had the means to pay, and those things is ascertained by reference to facts which could be verified without doubt or delay. The banks were to pay so much, not according to their capital, but according to their paid-up capital, and so much on their place of business. Whether that method of assessing a tax be sound or unsound, wise or unwise, is a point on which their lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province, it is for the legislature, and not for the courts of law, to judge of its expediency.

Then, is there anything in section 91 which operates to restrict the meaning ascribed to section 92? Clause 3 is certainly in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the provincial legislature exclusively, or at all, the power of direct taxation for provincial or other purposes. That very conflict between the two sections was noticed by way of illustration in *The Citizens Insurance Co.* and *Parsons*, 7 App. Ca. 96, where their Lordships said: "So, the raising of money by any mode or system of taxation, is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large to include direct taxation within the province in order to the raising of a revenue for provincial purposes, assigned to the provincial legislatures by section 92, it obviously could not have been intended that in this instance also the general power should override the particular one." Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise money for provincial purposes, the subject falls wholly within the jurisdiction of the provincial legislature.

It was earnestly contended that the taxation of banks would unduly cut down the powers of Parliament in relation to matters falling within class 2, viz., the regulation of trade and commerce, and within

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class 15, viz., banking and the incorporating of banks. Their lordships think that contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the province where they carry on business can interfere at all with the power of making laws on the subject of banking or with the power of incorporating banks. The words, "Regulation of trade and commerce," were, indeed, very wide, and in *Severn's* case it was the view of the Supreme Court that they operated to invalidate the license duty, which was there in question. But since that case was decided the question has been more completely sifted before the committee in *Parson's* case, 7 App. Ca., and it is absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which were given exclusively to the Provincial Legislature. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-Provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any Provincial taxation on the person or things regulated, so far from restricting the expressions, as we found necessary in *Parsons'* case, they would be straining them to their widest conceivable extent.

Then it was suggested that the Legislature might lay on taxes so heavy as to crush the banks out of existence, and so nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion, but whatever power falls within the legitimate meaning of Classes 2 and 9 is in their lordships' judgment what the Imperial Parliament intended to give; and to place a limit on it because the power might be used unwisely, as all powers might, would be an error and would lead to insuperable difficulties in the construction of the federation act.

Their lordships were invited to take a wide range of this part of the case, and to apply to the construction of the Federation act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case, but he was dealing with the constitution of the United States. Under that constitution, as their lordships understand, each State could make laws for itself uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the State Legislature

came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation act must be so construed as to allow no power to the Provincial Legislatures under section 92 which might by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their lordships have to construe the express words of an act of Parliament, which made an elaborate distribution of the whole field of legislative authority between legislative bodies, and, at the same time, provided for the federated provinces a carefully balanced constitution under which no one of the parts could pass laws for itself except under the control of the whole, acting through the Governor-General, and the question they had to answer was whether the one body of the other had power to make a good law. If they found that on the construction of the act a legislative power fell within section 92, it would be quite wrong of them to deny its existence, because by some possibility it might be abused, or might limit the range which otherwise would be open to the Dominion Parliament.

It only remains to refer to some of the grounds taken by the learned judges of the lower courts, which were strongly objected to at the bar. Great importance was attached to French authorities, who laid down that the *impot des patentes*, which was a tax on trades, and which might possibly have afforded hints for the Quebec law, was a direct tax. And it was suggested that the provincial Legislatures possessed powers of legislation, either inherent in them or dating from a time anterior to the Federation act, and not taken away by that act. Their lordships had not thought it necessary to call on the respondent's counsel, and there fore possibly had not heard all that might be said in support of such views; but the judgments below were so carefully reasoned, and the citation and discussion of them had been so full and elaborate, that their lordships felt justified in expressing their present dissent on those points They could not think that the French authorities were useful for anything but illustration, and they adhere to the view which has always been taken by this committee, that the Federation act exhausted the whole range of legislative power, and that whatever was not thereby given to the Provincial Legislatures rested with Parliament. The result is that, though not wholly for the same reasons, their Lordships agreed with the Court of Queen's Bench and they will humbly advise Her Majesty to affirm their decree and dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favor of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favor of the other banks. The insurance company

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is taxed in a sum specified by the Quebec act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favor of the banks. The cases have been treated as substantially identical in the courts below, and their Lordships will take the same course with respect to all of them. The applicants in each case must pay the costs of appeal.

PRIVY COUNCIL, 1878.

12th July, 1876.

Les Sœurs Dames Hospita'rs de St. Joseph de L'Hôtel-Dieu de Montréal & Middlemiss.

Présent : Sir James W. Colvile, Sir Barnes Peacock and Sir Robert P. Collier.

LES SŒURS DAMES HOSPITALIERES DE ST JOSEPH DE L'HOTEL DIEU DE MONTREAL *v.* JOHN R. MIDDLEMISS.

This case has been argued with great learning and ability on both sides. The question, however, between the parties is reducible within narrow limits; and that question having been very fully argued, and their Lordships having had an opportunity of considering the authorities cited, they do not think it necessary to reserve their judgment.

The appellants are a religious community known as Les Religieuses Sœurs Hospitalières de St. Joseph de l'Hôtel Dieu de Montréal, and are the seigniors of a fief in Montreal known as the Fief St. Augustin. The respondent is the present proprietor of a piece of land within the ambit of that fief, and, at one time, unquestionably held of it subject to the feudal rights then incident to such a tenure. The proceedings out of which this appeal has arisen were taken by the appellants in order to recover from the respondent, as owner of this land, the commutation fine to which, as they allege, they were upon the transfer thereof entitled under the 74th and following sections of chapter XLI, of the Consolidated Statutes of Lower Canada, intituled "An Act respecting the general "abolition of feudal rights and duties." The 74th section is as follows: "In the Fief St. Augustin * * *lods et ventes*, and other casual "dues, including *droit de banalité* and all seigniorial dues whatever, "were abolished on the 19th day of May, 1860, and instead thereof the "*cens et rentes* have since that day been and shall be represented by a "*rente constituée* of the same amount (in money or kind, as the case "may be) secured by the same privileges, and payable at the same "periods, until the capital thereof becomes payable as hereinafter pro-"vided; and a commutation fine equal to that which the Seminary of

" St. Sulpice, of Montreal, is entitled, in the city and parish of Montreal, " and to be calculated and ascertained in the manner prescribed by " chapter 42 of these Consolidated Statutes respecting the said seminary, " and by the 69th section of this Act, subject to the provisions herein. " after made in section 84 of this Act, as to the rate of commutation " according to the situation of the property, shall be payable to the " seigniors of the said fief, or any portion of it, on the first mutation " which would have created *lods et ventes* of the ownership of any pro- " perty happening in the * * * Fief St. Augustin * * * during " the 20 years next after the said day." Upon the transfer to the respondent of this piece of land in 1874, the appellants conceived that the period prescribed by the Statute as that at which they would be entitled to the commutation fine had arrived, and accordingly, in conformity with the procedure prescribed by the Statutes for ascertaining the amount thereof, they called upon the respondent to appoint an arbitrator. He refused to do so. They then took the next step prescribed by the Statutes, and petitioned the Court to appoint an arbitrator on his behalf. A defence was raised to that claim, which will be afterwards considered. The result was that the Superior Court upheld the claim and appointed an arbitrator. The amount of the commutation fine was afterwards ascertained in due course, and a decree made accordingly. Against those two decrees of the Superior Court there was an appeal to the Court of Queen's Bench, the Judges of which were divided in opinion, but the majority held that the proceedings had been irregular from the beginning; that no arbitrator ought to have been appointed, and that the application of the appellants ought tohave been dismissed. This appeal is against their decree.

Before considering the merits of the case, it may be well shortly to recapitulate the history of the devolution of this property. In 1805 it seems to have been vested in one Willirm Hallowell. In his hands it was subject, not only to the seigniorial dues, but to certain reserved rents and other charges, conventions, and servitudes which were expressed in a deed of accord of the 9th October, 1805. On Hallowell's death his interest in the property became divisible amongst his wife and children, and, by two notarial deeds of the 8th October, 1839, respectively, one-tenth of that interest was duly conveyed to and became vested in one William Robertson, the remaining nine-tenths being in like manner conveyed to and vested in one Charles Montizambert, each of whom accepted as purchaser in trust for the commissioners appointed for the purpose of erecting a lunatic asylum in the said district of Montreal, and their successors, and with an obligation on his behalf to reconvey in a due manner unto the said commissioners and their successors, so soon as they should be duly authorized to accept a deed to that effect, the undivided part conveyed to him of the said property. It appears that, under a colonial statute, public money had been appro-

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priated to certain persons as commissioners generally for charitable purposes connected with lunatics, and that there was then an intention at least of making those persons a corporation capable of holding land. The purchases were unquestionably made with the public moneys so appropriated to the commissioners. Nothing, however, was afterwards done to constitute them a body corporate, or to authorize them to hold lands: and it appears—though it is not very distinctly shown when—that some time between 1841 and 1844 they had ceased to exist, and that the Government of Canada was then in possession of the land. The next transaction in order of date is that of the 20th April, 1860, and, as will afterwards be shown, it is upon the true effect and nature of that transaction that the determination of this appeal now almost admittedly depends. Before and about that time various statutes had been passed with the object of abolishing all feudal rights of the seigniors, and of giving to the tenants a free allodial tenure. The Statute, however, which related to this particular fief was not passed until the 19th May, 1860, and was one of several that were embodied in the Consolidated Statutes, Chapter 41. On the 14th January, 1861, after the Statute had come into effect, a notarial act was passed between Montizambert, who held nine-tenths of the property under the trusts already mentioned, and Her Majesty the Queen, represented by the Honourable John Ross, described as a Commissioner of Public Works, by which the nine-tenths of the property vested in Montizambert were formally conveyed to the Crown. That deed contains a recital in the words: "And "whereas the property hereinafter described was never conveyed to the "commissioners for the erection of a lunatic asylum in the district of "Montreal, that such commissioners have ceased to exist, and that by "the laws in force in this province the said property, having been paid "for out of the provincial funds, should be vested in Her Majesty, her "heirs and successors, and be under the management and control of the "Commissioner of Public Works for the time being." There is no trace in the record of any transfer of what English lawyers would call the outstanding legal estate of the remaining one-tenth from Robertson to the Crown; but there is no doubt that the Crown had long been in possession as well of that, as of the other nine-tenths, and, in fact, continued to be in possession of the whole property up to the 1st July, 1874. At that date it passed from the Crown to the respondent by means of an exchange *à titre de soulte et retour*, and it is admitted that if that transaction had taken place between subjects it would have been such a mutation of property as would have created *lods et ventes* within the meaning of the 74th section of chapter 41 of the Consolidated Statutes.

That being so, what was the defence made by the respondent to the appellants' claim? His first answer to their petition is at page 21 of the Record. The appellants put in their reply, whereupon the defendant obtained leave to file an amended answer. Mr. Digby has to-day

drawn their Lordships' attention to some supposed distinctions between the two answers, but their Lordships cannot see that there is any difference between them which materially affects the question now to be decided. They will, therefore, confine their attentiion to the last answer. That is to the effect, that the property in question had been acquired by the Crown by the notarial acts of the 8th October, 1839; that by those acts it was established that the property in question was acquired in the name of a trustee ("*en fidei-commis*") by the commissioners for the erection of a lunatic asylum in the district of Montreal, with the money of the Crown appropriated to that object; that the commission of these commissioners having expired about the year 1844 without their ever having effected the erection of the asylum, and the commissioners having consequently ceased to exist, the trust was extinguished, and the Crown united the property to its domain, and then began to possess and afterwards continued to possess it as proprietor up to the time of the aliénation in favour of the respondent Middlemiss; and further that the appellants had since that time treated the Crown as proprietor of the property, and had claimed the indemnity which was due to them as seigneuresse upon the said property, "*ainsi passé en main-morte.*" Their Lordships here pause to consider an argument which has been founded upon the words "*ainsi passé en main-morte.*" They think the words "thus passed *en main-morte*" cannot fairly be taken to import more than that the property had passed *extra commercium* under the circumstances above stated; and that if those circumstances do not support the conclusion that it had passed into hands which were in the strict sense of the term those of *gens de main-morte*, the respondent ought not to be held to have made an admission to that effect because his pleader has used in a loose way the term *main-morte* instead of that which Hervé, writing with precision, in his definition of "Indemnité," advisedly substituted for it, viz., *une main qui n'aliène point.* In the following passage he thus explains the use of those words: "Je dis en général aussi, une "main qui n'aliène point and non pas simplement une main morte, "parceque le Roi qui n'est pas mis dans la classe des main-mortes, doit "néanmoins une indemnité aux seigneurs dans la mouvance des quels "il acquiert," and then he proceeds to deal with the indemnity payable in the one case by *gens de main-morte*, properly so termed, and in the other by the Crown. The answer goes on to say that, on or about the 20th April, 1860, the Crown had paid to the petitioners an indemnity agreed between them by reason of the said property having ceased to be subject to seigniorial rights; and that by reason of the acquisition by the Crown of the said property, and the payment of the said indemnity, that property was united to the Sovereign's domain and ceased to be subject to any *mouvance particulière.* The reply of the appellants admits to a certain extent the facts pleaded by the respondent. It admits that the land had been acquired by virtue of the two notarial deeds in trust for

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the commissioners, to which commissioners the government of the province of Canada had afterwards succeeded; it also admits the payment of less a tenth, but says that that indemnity was not fixed and agreed upon by the parties, because the petitioners did not acknowledge the propriety of the deduction of the tenth, and further claimed *lods et ventes* on the purchase of 1829, which had been refused by the Crown. It then states what is in fact the real issue between the parties, viz. that the indemnity paid represented only that indemnity which was payable by all *mains-mortes* when they acquired immoveable property: that the effect of the payment was not *résoudre la mouvance, i.e.* to put an end to the tenure, but merely to suspend the rights of the seigniors so long as the property remained in the hands of the Government, and that it had been acquired by Robertson and Montizambert subject to all seigniorial rights, and so contieued to be, except so far as related to the indemnity *pour amortissement*. The appellants with their reply filed the account at page 24 of the Record, which is really the only evidence in the cause of the transaction in question. Their Lordships have felt, during the greater part of the argument, that the crucial question in the case was, which of the constructions put by the parties respectively upon that transaction was correct; or in other words, *quo animo* did one party pay and the other receive the indemnity mentioned in account. To that question they will now address themselves.

The case of the respondent involves two questions, one a question of law, and the other a question of fact. The question of law is whether by the law of Lower Canada the acquisition by the Crown of lands held from or under a seignior as part of his fief, did extinguish all feuda rights in those lands, and give to the seignior a mere right to an indemnity. The question of fact is, whether the transaction evidenced by the document at page 24 took place upon that footing. Those questions more or less run into each other, because it must be presumed that the parties dealt with each other with reference to the subsisting law, and the construction of the document, in so far as it is ambiguous, will therefore be facilitated by a consideration of what that law was.

Their Lordships do not think it necessary to go in great detail through the many authorities which have been cited in the facta of the parties, in the reasons of the Judges, or at the bar, as to what the law of France, and, consequently, the law of Canada, was upon that point. They have come to the conclusion that those authorities do establish that (whatever may have been the case in earlier times when the king of France seems occasionally to have submitted to do homage by attorney or otherwise, for acquisitions in the field of subject seigniors,) for a considerable time, probably very soon after the Edict of Moulins, passed in the reign of Charles IX, there was an end of that state of things, and that the Crown thenceforward acquired such properties with

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an extinction of all feudal rights therein, subject only to a right on the part of the seignior to receive an indemnity,—a right more or less strictly enforceable, but certainly recognized by custom. They also think it is established that up to the time of the Ordinance of Louis XIV, in 1667, the amount of that indemnity, when not determinable by legal custom or written law, was in the case of lands held by roturiers one-fifth of the price. This is very clearly stated by Hervé in a paragraph which applies, not only to the indemnity payable by *gens de main-morte* but also to the indemnity payable by the Crown. He says, "Lorsqu'il "n'y a aucune règle écrite ou lorsqu'il y a du doute, il faut suivre la "jurisprudence qui a fixé l'indemnité à la valeur du tiers des biens no- "bles et du cinquième de ceux qui sont roturiers, car cette jurispruden- "ce fait le droit commun dans les provinces où il n'y a ni loi ni usage "contraire." This view of the jurisprudence of France does not depend simply upon text writers, such as Guyot and others. It is confirmed by the various decisions or arrêts that have been cited by the learned Judges, and in particular by the arrêt in the case of *la terre de Bohin*; for although the decision in that case was subsequent in date to the Ordinance of Louis XIV, it is impossible to impute to the Judges who passed it, that they were not applying the law as it existed at the time when the feudal rights were alleged to have been extinguished.

What then is the effect of the Ordinance of Louis XIV, of which so much has been said? It assumed the existing law, and modified that law in so far as the amount of the indemnity was concerned. It prescribed a mode of calculating the indemnity less favourable to the subject, and also extremely complicated in form, in so far as it related to property held *en roture*. The second article of it, which relates to seigniories or fiefs purchased by the Crown, seems to preserve the old custom of calculating the indemnity at one-fifth of the value or price. Their Lordships here observe that it is by no means necessary to hold that this ordinance, which was passed four years after the establishment of the Superior Council in Canada, and therefore was not introduced *proprio vigore* into Canada, and was never afterwards registered in Canada, ever became part of the law of Canada.

It will subsequently be shown that the parties acted and dealt with each other upon the footing of the law as it existed before the passing of the Ordinance.

The next question is, was this law so defining the rights of the Crown ever introduced into Canada? Their Lordships can see no objection in principle to treating it as so introduced. It was merely part of the law of feudal tenure, which was unquestionably introduced into French Canada as the law of real property or part of the law of real property in that colony; and which after the conquest of Canada, when the province had passed under British dominion, continued to be law by virtue of the Imperial Statute, known as the Quebec Act. If the law

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relating to the rights of the Crown, which was part of the general law of tenure, was not introduced or continued in Canada, it should be shown affirmatively to have been excepted. What has been principally relied upon as establishing this, is the fifth sub-section of the 66th section of the Consolidated Statute, chapter 41. That portion of the Consolidated Statute does not, however, relate to the seigniory in question, or to seigniories of that class, but is confined to seigniories belonging to the Seminary of St. Sulpice. The enactment relied upon is, moreover, extremely general in its terms. It says, "The said payments by the "province shall include the commutation of the tenure of all property "now held by the province or the Crown, or by the War Department, "as representing the late Ordinance Department in any seigniory "belonging to the said Seminary, and such commutation shall be held "to have been perfected on the 4th day of May, 1859." It speaks of the tenure of all property held by the province or the Crown, or by the War Department. It does not positively assert that the Crown was treated as an ordinary *censitaire* in all seigniories in Canada in which it might hold lands, or in the particular seigniory which is in question here.

Reliance was also placed upon two statutes which relate to the officers of Her Majesty's Ordnance, and to lands purchased by them for the protection of the province with Imperial funds. It is possible that lands so purchased and held may have been subject to feudal rights, but their Lordships cannot infer from these particular statutes that the French law altered upon its introduction into Canada so as to affect the general rights of the Crown in Canada in the manner supposed, or that it has since been so altered.

It may be convenient to mention here that there is no doubt as to the law which is invoked on the side of the Appellant, namely, that upon an alienation by virtue of which property subject to feudal rights passed into the hands of *gens de main-morte*, in the proper sense of the word, an indemnity estimated also at one-fifth of the price became payable by the *gens de main-morte* as a compensation for the probable loss of *lods et ventes*. There was, however, this distinction between the indemnity payable by *gens de main-morte* and the indemnity payable by the Crown, viz., that upon the passing of the property out of the hands of the *gens de main-morte* the rights to *lods et ventes* again revived, the feudal rights so far as they were covered by the indemnity, being merely suspended: whereas in the case of the Crown, according to the authorities to which their Lordships have already referred, they were absolutely and forever extinguished. The real question, then, between the parties in this case is, whether the feudal rights in question were so extinguished, or only so suspended by the transaction of the 20th of April, 1860.

Their Lordships will now examine the document set out at page 24, and consider which of the contentions of the opposite parties it favours. It is in the form of a bill, presented by the seigniors and followed by a

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statement of what had been paid by the Government. It may here be remarked that the Provincial Government, as such, was not capable of holding lands, and that all lands acquired by Government for public purposes were required by law to be taken in the name of the Crown. The Bill is headed "Le Gouvernement Provincial." Those words clearly import that the bill was presented to the Provincial Govermnent as representing the Crown. It proceed thus "Pour lods et ventes sur son acquisition,"—that is, the acquisition by the Government, the representative of the Crown, from the heirs and representatives of William Hallowell,—"by two contracts of the 8th October, 1839, which passed "to Robertson and Montizambert, purchasers for the advantage of the "Commissioners of the lunatic asylum." It claims first the *lods et ventes* alleged to have been payable on that particular transaction, and then contains this item: "Pour droit d'indemnité sur le susdit prix de vente £192 0s. 10d." being one-fifth of the price. Then follows a claim from the Government of the *rente foncière*, which was reserved by the original deed to Hallowell in favor of the seigniors over and above their seigniorial dues for fifteen years, a claim which implies that at least during that period Government representing the Crown had been the proprietors of the land. How then did the Government, as appears by the second part of this document, deal with these claims? It rejected that for the *lods et ventes* upon the transaction of 1839, and it may well be presumed that the claim was so rejected because it had been established by judicial decisions in Canada that *lods et ventes* were not payable on a purchase for a purpose of public utility. It paid to the appellants the sum of £217 11s. 9d., which was composed of the following items, viz., 1st, the indemnity claimed £192 0s. 10d. less one-tenth, which was deducted on the ground that these particular seigniors were not entitled to the profits of *la haute justice*, and therefore that one-tenth was retainable to cover the claims of those that were so entitled; and, secondly, the sums claimed for the arrears of the *rente foncière*.

An argument was founded by the learned Counsel for the appellants upon the words "droit d'indemnité," and upon the fact that the payment was made of the "indemnité réclamée." It was contended that the words "droit d'indemnité" have received a statutory interpretation, and must be taken to import the indemnity payable to a corporation or other *main morte*. Their Lordships are of opinion that the words mean only a right of indemnity, and are to be construed *secundum subjectam materiam*. Here it appears on the face of the bill, as already shown, that the claim was against the Government as representing the Crown; that its title was referred to the transactions of 1839; and that it was treated as having been in possession of the property, and liable for the rent reserved for at least fifteen years before the date of the transaction. All this appears to their Lordships to afford the strongest inference that the indemnity claimed was that payable by the Crown.

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It was suggested, however, in an early part of the argument that the sum was not that which would have been the amount of the indemnity payable to the Crown under the Ordinance of Louis XIV, but, as their Lordships have already observed, that only shows that ordinance was not treated as regulating in Canada the amount of the indemnity, but that the claim was made according to the law as it existed in France before that ordinance. On the other hand the view which the appellants take of the transaction is not altogether consistent with the document. There is on the face of the account no allegation that the sum claimed was the indemnity payable by *gens de main-morte* in the proper sense of the term. To treat the Crown as falling into that category would have been an error in law, and the facts stated in the bill which give a partial history of the former transactions, fail to show that at any time the property was held by any corporation or body of persons who were capable of being treated in the proper sense of the term as *gens de main-morte*. Therefore it appears to their Lordships that upon the true construction of this document it must be held that the indemnity was claimed and paid as an indemnity payable by the Crown, with the legal incidents of a purchase by the Crown, and the payment of an indemnity thereon, namely, that the feudal rights were thereby extinguished and became incapable of being revived.

The chief argument, not already dealt with, which has been used against this construction was founded upon the expression in the deed of 1861, which conveyed the legal estate to the Crown. Their Lordships are not prepared to say that a plausible argument cannot be raised upon that point. That deed, however, cannot be used in the way of admission or estoppel as regards this question, because the appellants were no parties to it; and it seems to their Lordships tha a sufficient explanation of the difficulty is that given by the learned Chief Justice of the Court of Queen's Bench, which is to the effect that the clause was put in for the protection in the ordinary way of the conveying party, and to relieve him from any claim which might possibly be made against him in respect of seignorial rights. Their Lordships cannot set any inference which arises from those clauses against what upon a full view of the law and the facts they think was the effect of the transaction of April, 1860. It seems to them that their view of that transaction really disposes of the case, and that it is unnecessary to deal with any other questions that might be raised upon the construction of the Statute and the effect of the conveyance to the Crown of 1861 or any of the other points which have been more or less raised in the course of the argument before them. It will be their duty on the whole case humbly to advise Her Majesty to affirm the judgment of the Court of Queen's Bench for Lower Canada, and to dismiss this Appeal with costs.

Pagnuelo & Major, for appellants.

Geoffrion, Rinfret & Archambault, for respondent.

L'Union St-Jacques & Belisle

PRIVY COUNCIL, 1874.

8th July, 1874.

Coram LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, AND SIR ROBERT P. COLLIER.

L'UNION ST. JACQUES MONTREAL *v.* DAME JULIE BELISLE.

The judgement of their Lordships was delivered by

LORD SELBORNE :—

The sole question in this appeal is this . whether the subject matter of the Provincial Act (33 Vict., c. 58,) is one of those which by the 91st section of the Dominion Act are reserved exclusively for legislation. The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section—their Lordships do not decide it, but for the argument's sake they will assume it ; certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for the exclusive legislation of the Parliament of Canada, called the Dominion Parliament ; but beyond controversy there are certain other matters, not only reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature in each province Among those the last is thus expressed : " Generally all matters of a merely local or private nature in the province. " If there is nothing to control that in the 91st section, it would seem manifest that the subject matter of this Act, the 33 Vict., c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of Montreal within the province, which appears to consist exclusively of members who would be subject *prima facie* to the control of the Provincial Legislature. This Act deals solely with the affairs of that particular society, and in this manner :—taking notice of a certain state of embarrassment resulting from what it describes in substance as improvident regulations of the society, it imposes a forced commutation of their existing rights upon two widows, who at the time when that Act was passed were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the association. Clearly this matter is private ; clearly it is in the province and in the city of Montreal ; and unless, therefore, the general effect of that head of sect. 92 is for this purpose qualified by something in sect. 91, it is a matter not only

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within the competency, but within the exclusive competency of the Provincial legislature. Now sect. 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated in this section shall not be deemed to come within the class of matters because the last and concluding words of sect. 91 are: "And any matter coming within any of the classes of jubjects enumerated of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." But the *onus* is on the respondent to show that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st, "Bankruptcy and Insolvency;" and the question therefore is, whether this is a matter coming under that class 21, of bankruptcy and insolvency? Their Lordships observe that the scheme of enumeration in that section is. to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing Faillite, bankruptcy and insolvency all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law covering this particular association is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. Benjamin, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature, to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of this statute. should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been beyond their competency; nor that, if it had been so passed, it would have been within the competency of the Provincial Legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law ever has been passed, and to

suggest the possibility of such a law as a reason why the power of the Provincial Legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.

It was suggested, perhaps not very accurately, in the course of the argument, that upon the same principal no part of the land in the province upon the sea coasts could be dealt with, because, by possibility, it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That was not a happy illustration, because the whole of the sea cost is put within the exclusive cognizance of the Dominion Legislature by another article; but the principle of the illustration may be transferred to Article 7, which gives to the Dominion the exclusive right of legislating as to all matters coming under the head of "militia, military and naval service, and defence." Any part of the land in the Province of Quebec might be taken by the Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that, because this which has not been done as to some particular land might possibly have been done, therefore, it not having been done, all power over that land therefore over all the land in the province, is taken away, so far as relates to legislation concerning matters of a merely local or private nature. That their Lordships think, is neither a necessary or reasonable, nor a just and proper construction. The fact that this particular society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or baekruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be re-instated.

Their Lordships are clearly of opinion that this is not an Act relating to bankruptcy and insolvency, and will, therefore, humbly advise Her Majesty that this appeal be allowed, that the judgment of the Court of Queen's Bench ought to be reversed, and that the suit be dismissed. There will be no costs of this appeal.

Judgment reversed.

Bischoff, Bompas & Biscoff, solicitors for the appellant.

Wilde, Berger, Thorn & Wilde, solicitors for the respondent.

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PRIVY COUNCIL.

London, March 25, 1885.

Present:—Lord Blackburn, Sir Barnes Peacock, Sir R. P. Collier, Sir R. Couch, Sir A. Hobhouse.

MACDOUGALL *v.* PRENTICE.

Per Curiam. The appellant in this case who was the plaintiff below and the respondent who was defendant, were partners in business. The plaintiff brought his action on the 18th April, 1872, for an account of the partnership affairs, and for the purpose of recovering from the defendant 80 shares in the Canada Lands Purchase Company, or the value of such shares, which the plaintiff put at $240,000. Upon the partnership accounts, apart from the shares in question, the plaintiff has been found indebted to the defendant in the sum of $16,188, and there is now no controversy upon that point. The appeal relates only to the rights of of the parties with regard to the shares.

The partnership was formed in February, 1869. One portion of its business was the purchase and sale of mineral properties and the formation of companies, and the profits arising from this sourse were to be divided in the proportion of three fourths to the defendant and one-fourth to the plaintiff. In 1870 the partners agreed to purchase the property of the Montreal Mining Company, with the intention of forming a new company to work the mines. The contract was effected partly in Canada by the the plaintiff and partly in London by the defendant, but it was completed in London in the name of the defendant and by the defendant with the assistance of Mr. McEwan, who provided the requisite deposit on condition that he should have an equal share in the profits.

The partners then set to work to form a Company who should provide the purchase money and take the property off their hands. After some abortive negotiations, the money was provided by a Mr. Sibley and some others to whom the defendant transferred the benefit of his contract. They projected a company which the plaintiff in his declaration calls the Canada Lands Purchase Company; and it was proposed that the whole property should be represented by 1,6000 shares, and that the defendant should be entitled te one tenth of the whole.

In point of fact this Company never was formed, nor were any specific shares, or, so far as appears, any scrip in it issued. But there was a considerable amount of dealing with the interests which the parties had bargained for, and those interests are for the sake of convenience called shares, each share representing one 1,600th part of the whole. Such are the 80 shares for which the plaintiff sued, being half of the 160 apportioned to the defendant.

On the 30th December, 1870, the defendant sold 80 of the shares to

Mr. Learned for the sum of $10.000 American currency, equal to $9,000 Canadian currency, which the defendant received and did not at that time carry into the partnership accounts. In consequence of this transaction, or at least very soon after it, the plaintiff made a claim to one half of the profits arising from the purchase and the sale to Sibley and his colleagues. At the end of June, 1871, he filed a bill against the defendant in the Supreme Court of New York County, within whose jurisdiction it seems that Sibley resided and the Company was being formed. It is very difficult to understand the exact ground taken by the plaintiff in this suit. In his declaration he alleges that the defendant had employed him as a broker to negotiate a purchase; that the defendant had sold the property purchased, and had realized as profits the sum of $22,500, of which the plaintiff claimed half. It is impossible to identify these allegations with any part of the story appearing in the Record. It further appears from the oral evidence that the plaintiff went on to attach the unsold 80 shares, but there is no documentary evidence of such an attachment. It is not, however, necessary to have accurate knowledge of these matters, because the parties settled the litigation by an agreement, the construction of which is the main question on this appeal.

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This agreement was effected by three instruments of simultaneous date. The first is a transfer in the following terms :—

"Know all men by these presents that I Edward Alexander Prentice, of the city of Montreal, in the Dominion of Canada, have, in consideration of the sum of one dollar of lawful currency of Canada to me in hand paid by Hartland S. MacDougall, of the same place, and for divers other valuable considerations moving from him to me, do by these presents grant, bargain, sell and assign, to him, the said Hartland S. MacDougall, his heirs and assigns, all and singular the right, title and interest which I, the said Edward Alexander Prentice, now have in and to the undivided one-tenth interest in all the property mentioned in the bond made by the Montreal Mining Company to me, a copy of which bond is hereunto annexed marked 'A,' said interest in said property being now held in trust for me by Alexander H. Sibley, Eber B. Ward, Edward Learned, Peleg Hall, and Charles A. Trowbridge, trustees, as by reference to the indentures, copies of which are hereto annexed marked "C and D," will more fully appear, my interest at present remaining in said property being an undivided one-twentieth interest therein.

"To have and to hold the same unto the said Hartland S. MacDougall, his heirs and assigns, as fully and effectually as I by virtue of the said indenture or in any other manner whatsoever, hold the same, and I do hereby covenant with the said Hartland S. MacDougall, that I have good right to transfer and assign the said interest, and that I will execute such further assurances thereat as may be requisite.

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"In witness whereof I have hereunto set my hand and seal, this third day of March, 1871.

"EDW. ALEX. PRENTICE. (L.S.)"

The second is in the form of a letter from plaintiff to the defendant:—

"Edward A. Prentice, Esq.

"63 Wall Street, New York.
3rd March, 1871.

"DEAR SIR,—In consideration of your assignment to me day of your remaining interest in the property formerly belonging to the Montreal Mining Company and now held by Alex. H. Sibley and other trustees, I hereby agree that my interest therein to the extent of one half of that conveyed by the said assignment, or one fortieth of the whole interest originally held by you shall be liable in said proportion for any damages which may result to you by reason of any suit which Mr. Alexander McEwen of London, England, may institute against you or failure to secure his interest, or any expenses which have been already incurred in the negotiation of the sale of the property by you.

"Yours truly,

H. S. MACDOUGALL.

By the third instrument the plaintiff purports to assign his interest to Mr. Ashworth in trust for Miss Auldjo, his assignment being in the same form as the defendant's assignment to himself. It is agreed that Miss Auldjo was a mere nominee of the defendant.

The general effect of the three instruments is that, as between the plaintiff and the defendant, the former becomes the owner of half the then unsold shares, while the latter remains the owner of the other half; that the defendant also remains the owner of the price of the sold shares, and that the plaintiff undertakes that his interest shall meet MacEwan's claim in some proportion, the extent of which has been disputed. Why the parties went through the process of assignment with warranty of one-twentieth interest to the plaintiff, and immediate re-assignment of one-fortieth by him to the defendant, through the form of assignment with warranty to Ashworth and Miss Auldjo, is not clear, but it probably was intended to throw difficulties in the way of MacEwan who was then pressing his claims.

In June, 1871, MacEwan commenced a suit in New York against both the partners and against Sibley and his co-promoters, claiming the whole of the unsold shares as his half of the profits of the transaction, and on the 9th of the following December, he obtained a decree for his whole claim. The partners threatened an appeal, but abandoned it on MacEwan giving back eight shares. After this had been done, all the profits remaining to the partners were these eight shares, and the price of the eighty shares sold. The partnership was dissolved on the 2nd

November, 1871, a little earlier than MacEwan's decree, but that dissolution cannot alter the results of the contract of March, 1871. On the 30th January, 1872, the eight shares were placed in the names of Messrs. Shanly and Crawford in trust for the plaintiff and defendant. They are now represented by 288 shares in the Silver Mining Company of Silver Islet, and eight shares in the Ontario Mineral Lands Company, still standing in the same names.

It has been stated that both in the writ of 1871 and in this suit the plaintiff claimed half the interest in the profits of the transaction. The same claim has been advanced on this appeal. But both the Courts in the colony treated it as a partnership transaction, and their Lordships are clear that it was such; that the partnership was both entitled to the profits and liable to MacEwan's claim. The agreement of March, 1871, gave to the plaintiff the same proportion to which he was entitled under the partnership deed.

By decree dated 31st May, 1881, the Superior Court ordered the defendant to pay the plaintiff $63,811, unless he preferred within 15 days to transfer to the plaintiff 40 of the 80 shares sued for. The Court considered that by the agreement of March, 1871, the defendant had absolutely contracted to transfer 40 shares to the plaintiff, and, having failed to put him in possession of them, must make good their value. It fixed the value upon the day when the action was commenced, at the rate of $2,000 a share, and set off against $80,000 so obtained the sum found due from the plaintiff upon the general account.

The defendant appealed to the Court of Queen's Bench, who made their decree on the 23rd January, 1884. They reversed the decree below, directed that the shares held in trust should be divided between the plaintiff and defendant in the proportion of one part to the former and three to the latter, and dismissed the other conclusions of the plaintiff's action. The decree recites that the plaintiff is entitled to his share of the $9,000 the price of the 80 shares sold by the defendant, and that such share with interest from the 30th of December, 1870, are more than compensated by the $16,188 due upon the accounts.

From the judges' reasons it appears that they agreed in thinking that the plaintiff was entitled under the terms of the agreement of March, 1871, to 40 shares, which, however, putting the returned eight shares out of consideration, were reduced to 20 by MacEwan's claim, and that for these 20 the plaintiff, not being able to get them, was entitld to compensation. They also agreed that his compensation should not exceed the quarter of the $9.000, but in their reasons for this opinion they differed. Chief Justice Dorion, looking upon the transaction of that day as a *partage* or a division between partners, thought that the shares must be valued as upon the 3rd March 1871, and were not shown to have been of any greater value than on the 30th December when the sale of the 80 shares took place. The other Judges, whose opinion is

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delivered by Mr. Justice Ramsay, agreed that the transaction of March 1871 was a *partage*, but they considered that the eviction of a partner from his share necessitated a new *partage*, so that the sole remaining property was to be re-divided according to the partnership deed.

From this decree of the Queen's Bench the plaintiff appeals, contending both that it ascribes to him too small a number of shares, and that it has put them at too low a value. He maintains that the smallest number of shares to which the agreement of March, 1871, entitles him is 40; that if that agreement is held inoperative he is entitled to half the firm's share of profits, and to be indemnified by the defendant against MacEwan's claim; and that the compensation for the shares which he cannot get should be assessed by taking the value of the shares either on the 9th December 1871, the date of MacEwan's decree, or at the institution of MacEwan's suit, or at the institution of this suit.

It has been already stated that the shares were a partnership asset, and MacEwan's claim a partnership liability, which is inconsistent with the plaintiff's claim to half profits and indemnity. As to the other questions, their Lordships do not find it necessary to decide upon the arguments which were pressed very fully at the bar with reference to the local law by which the contract of March, 1871 ought to be construed, and with reference to the rules of law which regulate warranties upon sales and upon partitions of common property. They think this unnecessary, because the case is governed by a special contract made with knowledge of the cause from which the disputes have sprung, and containing within itself the grounds on which they must be settled.

Their Lordships view the agreement of March, 1871, as calculated to effect three main objects between the parties: first, to divide the 160 shares as a partnership asset would be divided according to the terms of the partnership deed; secondly, in affecting the division to attribute to the defendant's three fourths the whole of the 80 unsold shares; and thirdly, to stipule that the loss arising from McEwan's claim should fall on the partners rateably according to their shares. There is no reason to suppose that the defendant's sale of the 80 shares was in excess of his power as a partner, but the plaintiff, whether with reason or without, was contending that the shares were not a partnership asset, and in abandoning that claim he stipulated to have a full quarter of the shares as such. Thus, as between the partners, the plaintiff took his whole interest in shares, giving up his antecedent right to participate in the $9,000; and the defendant took to the purchase effected by himself, giving up his antecedent right to have three fourths of the shares.

Then comes MacEwan's claim and sweeps away all the unsold shares. The defendant cannot give the plaintiff any shares; but why? Not only on account of MacEwan's success, but by the conjoint effect of that and of his own previous sale. If he had not sold the 80 shares, there would have been 80 to answer MacEwan's claim and 80 to

divide. Perhaps the position of the parties is kept more precisely in view by dropping the convenient designation of shares and taking up the more abstract and more accurate terms in which they speak of their interests. There were then no separate shares in existence capable of being specifically transferred; the interests in existence were subject to be bought and sold, but were only claims to aliquot parts of an undivided whole. Thus the defendant assigns to the plaintiff all his interest in the undivided one-tenth interest in all the property taken from the Montreal Mining Company, "my interest at present remaining in the said property "being an undivided one-twentieth interest therein." And the plaintiff agrees that his interest just acquired by the defendant's assignment, "to the extent of fortieth of the whole interest originally held by you," shall be liable in that proportion to MacEwan's claim. It is not said how the defendant's interest was reduced from a tenth to a twentieth, but it cannot be doubted that the parties were referring to the defendant's sale of the other twentieth; and when the whole interest of the partnership was shown by McEwan's suit to be only a twentieth instead of a tenth, and so the plaintiff's intended portion was reduced from a fortieth to an eightieth, he became entitled, under the agreement, to have that eightieth made good to him in specie so far as the partnership assets sufficed for it.

This view of the contract tends to support Chief Justice Dorion's opinion as to the eight shares. He says, "In the view that we take of "this case, that the transfer of the 3rd March 1871 constituted a division "of common property, these eight shares should be returned to the "respondent (*i. e.*, the plaintiff), and thereby reduce his claim for in-"demnity to 12 shares instead of 20." Then he goes on to mention reasons which make him think it more equitable to make the decree in the form in which it stands. The reasons point to a desire to alleviate the plaintiff's loss.

Now before pursuing this question further, or deciding the precise mode of apportioning what remains of the shares, their Lordships ask what practical difference will be made by giving the plaintiff more shares than he takes under the decree. That depends upon the value at which the shares are assessed for compensation to him. His original agreed quantity is 40; of these 18 go to make good MacEwan's claim, and he is not to be compensated for them. The agreed quantity is thus reduced to 22, and the plaintiff is entitled to compensation for so many of them as he does not get *in specie*. Then the question is, on what basis of value?

Their Lordships cannot accept the view of the Superior Court, that the date of the action is the proper time for ascertaining the value; a view which, if tenable, would give to the plaintiff the power of taking property of a highly speculative and fluctuating character at flood tide, and there fixing the value as the thing he had been deprived of. Nor

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can they agree with the argument at the bar, that on the 3rd March, 1871, the defendant sold 40 shares with warranty of title to the plaintiff, that MacEwan's suit was an eviction of the plaintiff from that property, and that its value must be ascertained either at the commencement of that suit or at the date of the decree in it. It is difficult to say that the transaction was a sale, or that the form of sale with warranty was anything more than a form adopted not to express the exact transaction between the partners but with some other view, ar that there was eviction from a property which never was or could be possessed by the assignee. No doubt MacEwan's suit intercepted the claim of the plaintiff to have shares from the Company; but as between the plaintiff and defendant that suit is the very thing which is contemplated by their agreement, and is the subject of special stipulation which does not contain any provision for indemnity to the plaintiff if thereby he failed to get the 40 shares designed for him.

The fact is that the agreement never took effect at all so as to vest in the plaintiff any right to a share in the property, or any possession of such a share. Half the defendant's nominal interest of one tenth really belonged to MacEwan, though that result was not then ascertained. The other half had disappeared by the sale of the 30th December 1870. The breach complained of was simultaneous with the agreement itself. It seems to their Lordships impossible to say that the value of the property which the defendant purported to assign, but owing to prior events well known to both parties, did not assign, is to be ascertained at any later time than the 3rd March 1871. Some strong reasons might be advanced for taking the value on the 30th December when the 80 shares were sold, but their Lordships will not produce the same result as a valuation on the 3rd March.

C. J. Dorion's view is that the shares should be valued on that day, and he goes on to find that the plaintiff, whose business it was to show that the shares were of greater value on that day, has not done so. Their Lordships agree with this finding. From the evidence of Sibley, and of Learned the purchaser of the 80 shares, it is clear that the value of the property was a fanciful one, and subject to abrupt changes. It was not in the market at all. All sales were the result of personal negotiotions, Sibley tell us that in March 1871 he bought a few shares at $600 per share, and the next day was offered $1,000. When prices can vary 66 per cent in 24 hours no inference can be drawn as to the prices of one day from even of the next. And here the evidence does not approach to the 3rd March by, it may be, three to four weeks. Sibley and Learned are both asked the price on that day. Sibley only says that, "in March" the shares could realize from $500 to $600. Learned says that he is as unable to give the value of the shares at that as at the present time, inasmuch as it is very fluctuating, and that "two or three months" after his purchase from the defendant he sold several parts for 500 dollars

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each. Shanley one of the trustees says, "I would not have held stock at any time in this Company for a week, if I had owned any at any time. If I could have got $10,000 for 80 shares I would have taken it and have been glad to get it." He is speaking of $10,000 American currency equal to $9,000 Canadian currency. That is all the evidence bearing on the point.

There is then no difference in point of money whether the plaintiff receives compensation by way of sharing directly in the $9,000 as the price of shares sold for the partnership, or by way of damages at the rate of $112.5 per share for those shares which by the terms of his contract he ought to have received, but has not received. If he were to receive more shares, and to be compensated for fewer, there would be a difference. But the difference would not be in his favour, because, even if the shares are worth anything at all, it is not suggested that they are worth anything like $112.5. The appellant has objected to the decree, not on the ground that it gives him too few shares in specie, but on other grounds which have all failed. The only alteration which their Lordships think might possibly be made in the decree is one so slight that it would amount to an affirmance of the decree, with a small variation adverse to the appellant's interest. As between a decree so framed, and such a possible alteration, their Lordships do not feel called on to decide. It is better to dismiss the appeal.

Their Lordships will humbly advise Her Majesty in accordance with the foregoing opinion. The appellant must pay the costs of the appeal.

Appeal dismissed.

McLeod Fullarton, Q. C., and *Cunningham*, counsel for appellant.
Patridge & Co., solicitors in London.
Dunlop & Lyman, in Canada, for appellant.
Bompas, Q. C., and *Cromwell-White*, counsel for respondent.
Balton, Proffitt & Scott, solicitors in London.
R. A. Ramsay, in Canada, for respondent.

Mayor of Montreal & Drummond.

PRIVY COUNCIL, 1876.

16th May, 1876.

Present: Sir James W. Colville, Sir James Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier.

MAYOR OF MONTREAL v. DRUMMOND.

Per Curiam.—The action which gives occasion to this appeal was brought by the Honorable Lewis Drummond (the respondent) against the Municipal Corporation of the City of Montreal (the appellants), for damages sustained in consequence of the Corporation having closed one end of St. Felix street in Montreal.

The declaration alleged that the plaintiff had built eight houses fronting St. Felix street, which at one end opened into St. Bonaventure street, and at the other into St. Joseph street, and that these houses, being in immediate proximity to the Bonaventure Station of the Grand Trunk Railway Company, had acquired great value as boarding-houses and shops. It then alleged that the Corporation, "without any previous notice to the plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, 'et par voie de fait,' closed up St. Felix street, and built from the south end of his houses to the opposite side of the street a close wooden fence, about fifteen feet in height; that in consequence the street had "become a *cul de sac*, and the occupants of the houses had lost their natural means of ingress and regress." It also alleged that the occupant of one of the houses had abandoned it in consequence of the destruction of his business.

The pleas of the Corporation (written in French) alleged that in closing the street they had not committed "un acte de violence et illégalité ou une voie de fait;" that they had not only exercised a privilege and used a power conferred upon them by their charter of incorporation, "et qu'en exerçant ce privilége ils n'ont pas impiété sur la propriété du demandeur;" that in the several Acts of Incorporation of the city the Legislature had specially designated the cases in which they were liable to indemnify individuals for the demages resulting from the exercise of their powers, that is to say:—"1, l'expropriation forcée; 2, le changement de site des marchés; le changement de niveau des trottoirs;" and that whilst acting within the limits of their powers, they were not responsible for damage. The pleas then state that the street "n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue."

The action then is founded on a trespass and wrong illegally committed by the Corporation, and the defence, stating it generally, rests on two grounds: (1) that the street was lawfully closed under powers conferred by the Legislature, and, therefore, no wrong had been committed for which an action in this form will lie; and (2) that the plain-

tiff was not by law entitled to any indemnity for the damages complained of.

The following are some of the material facts :—

St. Felix street opens, near the north end of the plaintiff's houses, into Bonaventure street, and extends northwards beyond the latter street to St. Antoine street. In its original state it ran southwards from the plaintiff's houses to St. Joseph street. This part of it was crossed on the level by the lines of the Grand Trunk Railway Company. The Bonaventure station was a short distance from the Plaintiff's houses, the ordinary approaches to it being in Bonaventure street. People could, however, go on foot from the station to St. Felix street, but only by walking over some lines of railway, and contravening, in so doing, the by-laws of the Company. It appears that the large number of persons, arriving by or waiting for the trains, went in this manner to St. Felix street, and frequented a house kept as a restaurant by one of the plaintiff's tenants, which they could no longer do by this short cut after the fence complained of was put up. In the years of 1863 and 1864 the Bonaventure Railway Station was greatly enlarged, and the goods traffic transferred from another station to it. These arrangements rendered it necessary to carry additional lines of rails across St. Felix street to the south of the plaintiff's houses, making the passage there difficult and dangerous. To assist these arrangements of the railway company the Corporation undertook to close the southern part of St. Felix street and open a new street to the south of the station. The manner in which the Corporation in fact closed or shut off this southern part was by placing a wooden barrier or fence, from 10 to 15 feet high, across the street immediately to the south of the plaintiff's houses. The place where people used to enter St. Felix street from the railway station, as before described, was to the south of this barrier, and the cutting off of this communication caused so great a diminution of the customers of the restaurant that the plaintiff's tenant gave up the business.

The authority under which the Corporation closed the street is a by-law made in persuance of an Act of the Provincial Legislature (23rd Vict. c. 72).

Section 10 of this Act authorized the Council to made by-laws for various purposes, and, among others (sub-section 6), "to regulate, clean, repair, amend, alter, widen, contract, straighten, or *discontinue* the streets, squares, alleys, highways, bridges, side and cross-walks, drains and sewers, and all natural water courses in the said city."

A general by-law was afterwards passed, section 3 of which is as fellows :—

"The Council of the said City of Montreal may, and they are hereby authorized whenever, in their opinion, the safety and convenience of the inhabitants of the city shall require it, to *discontinue* any street, lane or alley of the said city, or to make any alteration in the same, in part or in whole."

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And subsequently, on the 11 September, 1866, a special by-law relating to St. Felix street was made, which, after reciting that it was deemed expedient in the interest of the public to open a new street (describing it), "and to discontinue a portion of St. Felix street," ordains and enact, that a new street called Albert street be opened, and that a section of St. Felix street, describing by a plan and measurement (being the part to the south of the plaintiff's houses) "be henceforth discontinued."

It was not disputed that under those powers the Corporation might lawfully discontinue this portion of the street, but it was contended that they were bound, as an antecedent condition to indemnify the plaintiff for the damage he would thereby sustain, and that erecting the barrier before doing so was an unlawful act and a trespass. The whole case, indeed, of the plaintiff, so far as this action is concerned, rests on the assumption that his property has been invaded in a way to constitute "une expropriation," which, it was urged, could only be lawfully effected in conformity with Article 407 of the Civil Code of Lower Canada, "upon a just indemnity previously paid." It was argued that the Statute giving the power to make by-laws to discontinue streets should be held to have been passed rejected to the general law embodied in this Article.

Article 407 runs thus: "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid."

A similar Article is found in the Code Napoléon (Article 545).

These Articles undoubtedly embody a fundamental principle of the old French law, which, whilst allowing private property to be taken for purposes of public utility, asserted its generally inviolable nature by requiring previous payment of a just indemnity. They are found both in the French and Canadian Codes under the title "De la Propriété," and in both follow the Articles which define property or ownership.

The original Article in the Code Napoléon was in effect the declaration of a principle which, in France has been applied by numerous special laws. In the Canadian Code, also, Article 407 is supplemented by Article 1589, which is as follows:—"In cases in which immoveable property is required for purposes of general utility, the owner may be forced to sell it, or it may be expropriated by the authority of law, in the manner and according to the rules prescribed by special laws."

In the special laws passed both in France and Canada, the principle of previous indemnity in cases of "expropriation," properly so called, appears to have been generally maintained. But exceptions have been made in works of urgency: and it is obvious that special laws, when passed by competent authority, may adopt, reject, or modify this principle.

A distinction has long been made in France, and indeed it exists in

the nature of things, between "expropriation," properly so called, in respect of which previous indemnity is payable, and simple "dommage;" and a further distinction between direct damage, which gives the sufferer a right to compensation, and indirect damage, which does not.

Great research was displayed by the learned counsel on both sides in investigating the history of French law and procedure on these subjects, the powers conferred on the Tribunals, and the conflicts between them. According to the opinion of Dalloz the first complete system of procedure is to be found in the Law, 8 Mars, 1810. A short history of this and other laws upon the subject will be found in Dalloz's "Répertoire," tit. "Expropriation," c. 1.

It is sufficient for the present purpose to note that a conflict arose under these laws between the ordinary Courts of law and the Administrative Tribunals, during which numerous decisions bearing on the present controversy took place. It was settled, at least after the law, 8 Mars 1810, that the Courts of Law alone had jurisdiction to decide on the indemnity payable to owners of property in cases of expropriation, and that the province of the Administrative Tribunals was confined to cases of damage, but conflicts constantly arose as to whether particular cases fell within one or the other category, and the claims of owners of houses to indemnity for injury to their servitudes or quasi servitudes in public streets were a fertile source of them.

Demolombe adverts to these conflicts in his "Traité des Servitudes," and thus sums up the controversy. (Vol. 12, Art. 700.) Assuming, as he does, that the owners of houses bordering on streets are entitled to indemnity when "leurs d'accès ou de vues ou d'égouts," are suppressed, or injuriously affected, he asks what is the competent authority to determine their claims? His answer is, "Cette question est elle-même fort délicate. C'est le pouvoir judiciaire suivant les uns puisqu'il s'agit d'une question de propriété privée. C'est au contraire, d'après les autres, le pouvoir administratif, parcequ'il ne s'agit pas d'une véritable *expropriation*, mais seulement d'un simple *dommage*, quoique ce dommage soit permanent, et nous avons déjà dit (referring to vol. 9, Art. 567), que telle paraît être a jourd'hui, après beaucoup d'hésitation et de luttes, la doctrine généralement suivie." Delalieu, in his "Traité de l'Expropriation," arrives at the same conclusion. (See Art. 152, 6th Edit., pp. 85 to 87.)

No doubt in some of the French decisions and authorities the violation of rights of this kind has been treated has "une expropriation réelle." But in others it has been spoken of as being only analogous to it, as thus: "comme s'il subissait une expropriation réelle d'une partie de sol." (See Delalieu, p. 86; Curasson, p. 211.) Be this as it may, the result of the decisions appears to be correctly summed up by Demalombe, and it would seem that in France at the present day damage to rights such as "droits d'accès" to streets is not deemed to constitute "expropriation." Indeed, upon a reasonable construction of the language of Art.

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407 of the Code, it seems to apply to property which can be actually ceded, and for which indemnity could be fixed before it was ceded.

The compensation allowed in France for "dommage," as distinguished from "expropriation," seems to be founded on an equitable principle which the special laws have adopted subject to the regulations prescribed in them. But claims for damage, other than that arising from the cession of property, being for the loss caused by the execution of the works and as a consequence of them, it would be unreasonable to require previous indemnity; indeed, in many cases, the extent of damage cannot be previously ascertained. The discussion between the damage which grows from an expropriation, and that which arises from the execution of the works ("l'exécution ultérieure des travaux"), is plainly put and illustrated by Delalieu. The latter, he says, is, "non la suite de l'expropriation, mais la suite de l'exécution des travaux," and he shows how in the nature of things the indemnity for it cannot be assessed beforehand, but should be the subject of a subsequent inquiry, even in the case where an actual expropriation has taken place. (See Delalieu, Art. 301 to 305.)

Assuming, then, that the plaintiff had rights in St. Felix street which have sustained damage, their Lordships think he has failed to establish an expropriation, or an injury which would give him a right to preliminiry indemnity, so as to make the Corporation wrong-doers, and their act on closing the street a trespass, and "une voie de fait," because such indemnity had not been paid. It seems to them than if he has any claim, it is one to be prosecuted under the provisions af the Act relating to expropriatiens by this Corporation (27 and 28 Vict., c. 60) which will be hereafter considered. (See on this point Jones and Stanstead Ry. Co., L. R. 4 P. C. 98.)

Their Lordships observe that one of the grounds on which Mr. Justice Taschereau has sustained the action, instead of sending the plaintiff to the Special Tribunal constituted by the Act referred to, is that the parties had submitted to the jurisdiction of the Court, but they are unable to find sufficient evidence of submission or consent in the record to justify this conclusion.

Whilst upon the considerations just referred to, it seems to their Lordships that the present action is misconceived, they are reluctant to determine the case, without considering the other points (more nearly touching the merits of the claim) which were argued at the Bar. These were: that the plaintiff had suffered no injury which, by the French law, would give a right to indemnity: and that, if this were not so, the legislation authorising the act which caused the damage, had taken away the right of action. without providing compensation.

It cannot be denied that the law of France allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Demolombe enumerates as undoubted the

rights "d'accès ou de sortie, des vues, et d'égouts," (vol. 12, sec. 699) and the same rights are spoken of by Proudhon (vol. 1, Art. 369). The right of access to a house is of course essential to its enjoyment, and if by reason of rlterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of France he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these conseqnences. The occupiers of the plaintiff's houses can go from them into St. Felix street, and pass from it into other streets, and through them into all parts of the City. The only effect of making the street a *cul de sac* far as the rights of access and passage are concerned (apart from the loss of customers, to be presently noticed) is that the plaintiff's tenants have to go by other streets and further to reach the southern part of the city.

The Counsel for the plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house in it as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view ; but the weight of authority appears to be the other way. With all their industry the learned Counsel were unable to find, in the mass of French decisions on this subject, a single case in which it has been held that closing one end only of a street was an interference with the rights of access and passage which gave a claim to compensation. On the other hand, several authorities and decisions were cited to the contrary. Demolombe, in discussing the right of access and other rights in streets (which he acknowledges are servitudes that cannot be interfered with by the Administration without making compensation), considers the passage a man enjoys over that portion of a street, which is not necessary for immediate access to his house, to be, not a right, but only an advantage of which he may be deprived without compensation. And among the instances of interference with mere advantages, as distinguished from rights, he gives the following :—"Comme si par exemple l'Administration diminuait la largeur de la place ou de la rue, ou même si elle fermait la rue par l'un de ses bouts, de manière à en faire une impasse." (Vol. 12, sec. 699.)

In Dalloz, "Répertoire," tit. "Travaux Publics," sec. 816, it is said that to give a claim to indemnity, according to the constant jurisprudence of the Conseil d'Etat, the damage must be material, and the direct and immediate consequence of the works executed by the Administration, and that for indirect damage no indemnity is due. And in Section 818 he gives as an instance of indirect damage, "La déprédation causée à une maison située dans une rue, qui par suite de travaux publics a été fermée à une de ses extrémités, alors qu'elle reste, du côté opposé, une communication avec autres rues."

In Dalloz, "Recueil," 1856, part 3, p. 71, an important Arrêt of the Conseil d'Etat is set out, given in a case in which the owner of a house

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in a street at Toulouse, one end of which had been closed, claimed an indemnity of 40,000 fr. One of the considérants of this Arrêt, which affirmed the judgment of the Conseil de Préfecture rejecting the claim, is as follows :—

" Considérant que si la Rue de l'Orme-sec a été fermée aux voitures à celle de ses extrémités qui aboutissait à la dite place, elle est restée ouverte du côté opposé, et se trouve encore en communication avec la nouvelle rue de l'Orme-sec, qu'ainsi la dite maison n'ayant pas été privée de son accès à la voie publique, la dépréciation qu'elle aurait pu éprouver ne constituerait point un dommage direct et matériel qui pût donner droit à une indemnité, &c.

It certainly then appears that in France the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with a servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity ; and if this be so, there stems to be no reason or authority for declaring the law to be otherwise in Canada.

The authorities referred to leave untouched the question whether, if a street were stopped at both its ends, indemnity would be payable. It is enough to say that should such a case arise, it might possibly be contended with effect that a virtual destruction of the undoubted rights of access to the houses in the street so closed had been occasioned which would give to their owners a title to indemnity.

It was further contended for the plaintiff that beyond the mere passage through the street of which the occupiers of his houses were deprived, he had sustained special damage by reason of the loss of customers, who formerly came from the railway station into the street and were now prevented from doing so, and that thus the value of his houses for the purpose of the particular trades carried on in them was depreciated.

But it is to be observed that there was no authorized road from the railway station to this street, and the people who came into it from the station did so in an irregular manner, and by passing over the lines and works of the railway, in contravention of the bye-laws of the Company. This source of profit was obviously of a precarious kind, and cannot be regarded as permanent. The street does not appear to have been much used, being inconvenient, if not dangerous, from the frequent passing of railway trains, and, apart from the custom of the railway passengers, no special advantage seems to have been derived from its being a thoroughfare. French cases were cited to the effect that the loss of customers (unless, indeed, the right of access as before interpreted is infringed) would not be such a direct and immediate damage as would give a claim to indemnity. (See Dufour, " Droit Administratif appliqué," 275, 277, 333.) A similar decision was given by the House of Lords in Ricket *v.* Metropolitan Railway Company, L. R. 2 H. L. 175.

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Whether, if the closing of the street had cut off the plaintiff's houses from a place the occupiers had long used in connection with them, as from a wharf upon a public river, or had rendered the immediate approach to the houses difficult or inconvenient, he would have been entitled by French law to indemnity upon the principle on which two English decisions, turning upon facts of the kind just supposed, were determined, it is unnecessary to consider. But the present case differs from the supposed ones. The immediate access to the houses is not obstructed, and the occupiers of them had no special object beyond that of their neighbours in going to the part of the city which lies south of the barrier. Indeed, there is no evidence that any inconvenience was felt on this score, and probably none could have been given, for there appears to be another street, easily accessible to the occupiers of the plaintiff's houses, by which this part of the city can be reached, and which whilst only a little further, is probably more commodious, being less liable to obstructions from the operations of the railway. The gravamen of the damage, as proved, was the loss of the custom of the railway passengers already adverted to. No doubt the distinctions on the cases on this subject are fine. The English decisions (which are only referred to by way of illustration) as well as the French have been conflicting, and the boundary lines between them are in consequence somewhat indistinct. (See Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 213. Becket v. Midland Railway Company, L. R., 3 C. P. 97.)

One ground of damage complained of is due not to the discontinuance of the street, but to the manner of closing it. It is said the barrier which has been erected darkens the plaintiff's houses.

It may be that the plaintiff has some ground of complaint on this head, but he has not alleged in his declaration that the windows of his houses have been deprived of light, but only that the street has been darkened; nor does the evidence distinctly show a deprivation of light to an actionable degree, nor is such a deprivation found as a fact by the experts or the Judges. The great contest in the cause has been as to the damage arising from the suppression of the street, and not that due to the form of the barrier. Throughout Mr. Justice Taschereau's judgment, in which that learned Judge ably supports his own view, there is no allusion to loss of light as a substantive grievance. If, however, this or other damage has been occasioned by the proximity of the barrier it would be recoverable, if at all, under the Corporation statutes. The amount of damage assessed in the action is, in the main, given in respect of loss of custom and the consequent depreciation in the value of the houses.

The other questions argued turned upon the special Statutes relating to the Corporation. It was contended that these Acts excluded an action for indemnity, and gave no compensation in cases like the present. For the plaintiff it was denied that the action was thus excluded, but it was said that, if taken away, compensation was given.

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Upon the English legislation on these subjects, it is clearly established that a Statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the Statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable, if the work causing it had been executed without statutable authority.

In the Canadian Act (23 Vict., c. 72), authorizing the by-law in question, no compensation is expressly provided for the damage which may be caused by any of the acts it authorizes to be done. But in a previous Act (14 and 15 Vict., c. 128), provision for compensation is expressly made in two instances. Thus, the power to make by-laws for altering the footpaths or side-walks of any street is conferred subject to the provision "that the Council shall make compensation out of the funds of the city to any persons whose property shall be injuriously affected by any such alteration of the level of the footpath in front thereof." And the power to make bye-laws for changing the sites of markets and appropriating the sites, saves to any party aggrieved "any remedy he may by law have against the corporation for any damage he might thereby sustain."

The Counsel for the corporation referred to two or three other instances of express provisions in former acts relating to this corporation, and also to sets of acts authorizing roads, bridges, and other public works, which provided compensation in express terms, and contended that it might be inferred from this course of legislation that the intention was to exclude compensation, whenever it was not expressly given.

On the other hand, the Counsel for the plaintiff relied on the fact that no compensation was provided by the Act authorizing the bye-law in question, although the power it conferred would, it was said, justify an interference with property, and with undoubted servitudes, and also upon the difference between English and French law, arising from the existence of the Article of the Code, and the dissimilar systems of procedure in the two countries. Their contention, in substance, was that the special Acts should be read with and subject to Article 407 of the Code in the cases to which it was applicable, and also to the general law which gave, in certain cases at least, a right to indemnity for damage.

Whatever may have been the effect of the special Acts relating to this corporation before the passing of the 27 and 28 Vict., c. 60, they must now be read and considered with it. The Act is in leed a Statute upon expropriations. After reciting in the preamble that much difficul

ty was often experienced in carrying out the law in force relating to expropriations for purposes of public utility, it establishes a tribunal consisting of commissioners for determining the value of property expropriated, and a system of procedure for such cases. Then the 18th section enacts that these provisions shall be extended to all cases in which it becomes necessary to ascertain the compensation to be paid for any damage sustained by reason of any alteration in the level of footways made by the Council, or by reason of the removal of any establishment subject to be removed under any by-law of the Council, "or to any party by reason of any other act of the Council, *for which they are bound to make compensation.*"

It was contended for the corporation that this general clause referred only to such compensation as was expressly mentioned in their Statutes, though they could only point to two instances of such compensation which could satisfy the words, and these were contained in a Road Act. (36 Geo. III. c. 9), the powers of which were transferred to the corporation. Whilst, for the plaintiff, it was said that if it be held that actions for indemnity are taken away, this sweeping clause ought to be construed so as to comprehend all cases of damage for which, by the general law, indemnity would be due, and as being, in effect, equivalent to the common clause in the English Statutes containing the words "otherwise injuriously affected."

Reading the clause in the latter sense, compensation would be expressly given by it to all who may suffer—to use the English phrase—actionable damage. A provision to this effect, if it be made, would no doubt be equitable and reasonable; whereas, if it be not made, the scheme of compensation provided by these acts would seem to be defective. Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised; — since, in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27th and 28th Vict., c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party "by reason of any act of the Council for which they are bound to make compensation," shall be ascertained in the manner prescribed by the Statute, excludes, by necessary implication, actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that, in their view, the corporation, having acted within their powers, the plaintiff's claim (if sustainable at all) is of a kind which would fall to be determined by the Commissioners under the special Act.

It may be observed that the question of procedure in cases of this kind is not merely a technical one. This was pointed out in the judgment of this Committee in Jones *v.* The Stanstead Railway Company. It is there said: "The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that

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the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had."

On the whole case, their Lordships find themselves unable to concur in the judgment pronounced by the majority of the Judges of the Court of Queen's Bench, and they will humbly advise Her Majesty to reverse both judgments below, and to direct that the action be dismissed with costs. The respondent must pay the costs of this appeal.

Rouer Roy, Q. C., for the Appellant.

E. Barnard for the Respondent.

PRIVY COUNCIL, 1880.

Molson & Carter.

Council Chamber, Whitehall, 27th November, 1880.

Present :—THE RIGHT HONORABLE SIR JAMES COLVILLE, THE RIGHT HONORABLE SIR BARNES PEACOCK, THE RIGHT HONORABLE SIR MONTAGUE SMITH, THE RIGHT HONORABLE SIR ROBERT COLLIER.

MOLSON v. CARTER.

SIR JAMES COLVILLE :—This is an application for special leave to appeal against an order of the Court of Queen's Bench for the Province of Quebec, of the 22nd June, 1880, which confirmed an order of the Superior Court of the 16th November, granting a *capias* against the petitioner under the provisions of the 796th and subsequent sections of the Canadian Code of Procedure. It is obvious that their lordships would not, according to their usual practice, nor could they with propriety, grant special leave to appeal upon a question of this kind, unless they saw clearly that there had been some miscarriage in point of law, or very gross miscarriage in the two Courts, whose concurrent judgments are under appeal, on the matters of fact.

Now, without going into the complicated proceedings that have commented upon in this case, it is sufficient to state that the judgments of the Court below may be taken to have proceeded almost exclusively upon the act of the petitioner, in altering the deposit account of a certain sum of money in the Mechanics Bank, and the facts which led to that were simply these : The defendant borrowed from the plaintiff a sum which may be stated in round numbers at $32,000, ostensibly upon the security of certain property. He paid that sum of money into this Bank in his own name with a sort of special mark. As found, in July, 1874, he altered the heading of that deposit account so as to make it appear that the money was his wife's. The Bank became insolvent a

month or two latter, but just when it was on the eve of insolvency he drew out the $32,000 upon a receipt signed by him for and as the agent of his wife ; and it is upon that transaction that the Courts below have principally proceeded.

Now it is to be remarked that one of the learned Judges, Mr. Justice Monk, whose final judgment was in favor of the defendant, says this : "If Molson had altered the heading of the account on the eve, or immediately before the insolvency of the Bank, for the purpose of making it falsely appear that the $32,000 deposited in the Bank belonged to his wife and children when they really belonged to him-elf, and if this had been done with a view of making the withdrawal of the sum from the Bank possible, or at all events more easy of accomplishment, and with the further view, after such withdrawal, of making away with the amount to the detriment of his creditors in general and the plaintiff in particular, I think the *capias* might have been maintained ; for this would not be a case of so-called constructive secretion, which it is not clear the law recognizes, but a case of actual secretion ; the altering of the heading of the account being the first step in the process." But afterwards, and and in some degree because this alteration of the account was not immediately before the insolvency of the Bank, but a month or two earlier, the learned Judge came to the conclusion at which he ultimately arrived in favor of the defendant. It appears. however, to their lordships that there was abundant evidence from which Mr. Justice Papineau, sitting in the Superior Court, and the majority of the Judges of the Appellate Court, might come to the conclusion that the transaction was really one of the nature described by Mr. Justice Monk, and that it was a case of actual secretion or making away of property of the debtor within the meaning of the Code of Procedure. It is not necessary for them, they think, to go further, and to express a fuller opinion of their own on the facts of the case which they have not heard fully, and of course having had no opportunity of going in detail through the evidence in the case. Their Lordships, however, think that the Judges had before them ample evidence of the fraudulent intent which was imputed to the petitioner.

The case was put finally by Mr. Digby in this way, that the money was either the money of the wife, or that it was not ; that if it was her money, it was right to give it to her ; that if it was not her money, then that it could be shown to be properly applied. But their lordships think there is no pretence whatever on the facts for saying that this money was the money of the wife. It was set up, after the transaction of borrowing took place, that the property pledged was property which the defendant had no right to pledge, but that it was property which his wife and children, under his father's will, had by some substitution of interest which prevented his disposing of it. The money was borrowed by him on his own credit. The only inference to be drawn from the title of the wife, supposing it to be a good title, would be that it was

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a fraudulent transaction, in so far as it purported to pledge property that was not his. She could not have both the property and the money, and it is quite clear from some of the evidence which has been brought before their Lordships, that the petitioner has been treating this property as her's, that a lease has been granted of it, and he himself admits he is receiving rent payable by the lessee as *aliment* for his wife and children. Then if it were not her money the fraudulent act, if it were fraudulent, was complete when it was transferred into her name and afterwards withdrawn in her name, and withdrawn, too, as he then avowed, in order that he should not himself come upon the street, a statement which could only mean that he either wished to make a provision for his wife to keep him off the street, or that he had withdrawn it for his own purposes. The subsequent application of it to other creditors would not if established, have been material, and that, therefore, is an answer to the argument that the case should be sent for a new trial, or otherwise put into a way for further investigation in order that Mr. Barnard, the petitioner's solicitor, should be examined.

On the whole, their lordships think that they cannot advise Her Majesty to grant special leave to appeal, and that this petition must be dismissed with costs.

Petition rejected.

PRIVY COUNCIL, 1883.

London, 11th July, 1883.

Macdonald & Whitfield.

Coram LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR ARTHUR HOBHOUSE.

MACDONALD v. WHITFIELD.

Edward Macdonald and George Whitfield, who are respectively appellant and respondent in this appeal, were, in the year 1875, directors of a trading corporation known as the St. John Stone China Ware Company, which carried on business at St. John's, in the district of Iberville and Province of Quebec. At that time the concern was not in a very prosperous condition, and in the month of July, 1875, the balance due by the company in its account current with the Merchants' Bank of Canada was upwards of $17,000. The appellant was president and chairman of the Board of Directors; and he had endorsed the company's promissory notes, for its accommodation, to the Merchants' Bank, to the amount of $65,000. It appears that he had also given his personal guarantee to the bank, for the overdrafts of the company upon its account current, to the extent of $10,000

In July, 1875, the company, being in want of funds, applied to the bank, through the appellant, for further credit: and, on the 24th of that month, the agent of the bank at St. John's sent a written answer to the application, addressed to the late Mr. Lavicount, the secretary of the Company, in these terms :— Macdonald & Whitfield.

"Dear Sir,—Respecting your president's application to the bank for further extension of your credit, I have the pleasure to inform you that you have been allowed an extension of four or five thousand dollars in case of need. The bank, however, requires that the present advances, as they mature, be secured by the personal guarantee of your directors, should renewals be required, which could be done by their endorsation of the notes. Your account current is now overdrawn seventeen thousand six hundred and fourteen dollars and fifty four cents; and by giving me the company's note, endorsed as required, for 8,500 dollars, you will reduce your overdrawn account, leaving a balance of 760 dollars of above loan.

"I enclose a letter of guarantee along with a note, for signature by your directors, as required by the bank. to take the place of Mr. Edward Macdonald's personal security for the like amount."

Along with this communication there were sent to the secretary of the company the letter of guarantee, and also the note therein mentioned.

The letter in question, which was dated the 24th of July, 1875, and addressed to the agent of the bank, was expressed as follows:

"Dear Sir,—In consideration of the Merchants' Bank of Canada allowing the St. John's Stone China Ware Company to overdraw their account to the extent of ten thousand dollars, we herewith deposit with you, as collateral security for the due payment of such overdraft, the demand note of the company, endorsed by the following directors individually. . . . And we hold ourselves liable without prejudice to the ordinary legal remedies.—Subscribe ourselves, your obedient servants."

The note which accompanied the foregoing form of letter for signature by the directors was a promissory note by the company for $10,000, payable on demand to the order of the appellant, at the office of the Merchants' Bank of Canada, in St. John's.

Having regard to the pecuniary relations then subsisting between the company and the bank, the arrangements thus proposed by the latter are sufficiently intelligible. The bank had made large advances by discounting, or, in other words, purchasing the paper of the company endorsed for its accommodation by the appellant, and had also advanced upwards of $17,000 on current account, which was only secured, to the extent of $10,000, by the personal guarantee of the appellant. In these circumstances the bank was willing to make a further advance of from $4,000 to $5,000, provided the company complied with these three conditions :—In the first place, advances upon current notes which had

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been discounted by the bank were, in the event of renewals being required at maturity, to be secured by the personal guarantee of the directors of the company, such guarantee to be given by their endorsation of the renewal notes. In the second place, the note of the company for $8,500 duly endorsed by the directors as aforesaid, was to be delivered to the bank in payment and extinction *pro tanto* of the advances on current account, so as to reduce the debit balance of the company to nine thousand odd dollars. And, in the third place, the demand note for $10,000, when duly signed and endorsed by the directors, was to be deposited with the bank as a collateral security for overdrafts on account current, and was to be substituted for the appellant's personal security for the like amount.

No mention is made in the bank's letter of the manner in which the additional advance, or extended credit, of four to five thousand dollars was to be allowed to the company. It is obvious, however, that the bank was not prepared, and did not agree, to give the extended credit without security; and also that the result of carrying out the conditions upon which it was to be given would be to reduce the balance due on current account about $700 only below the amount of the demand note covering that account. It, therefore, seems matter of reasonable inference that the additional advance was to be made by the bank discounting the promissory note or notes of the company, duly endorsed by its directors.

On the 5th August, 1875, the directors of the St. John's Stone China Ware Company met for the purpose of considering the answer returned by the bank to the application, made through the appellant, for an extension of the company's credit. At that meeting all the directors of the company, five in number, were present, viz., the appellant, the respondent, and Messrs. Marler, Coote, and Macpherson. The minute of the meeting of the 5th August, 1875, as entered in the minute-book of the company, bears that "the letter of the agent of the Merchant's Bank of the "24th ultimo was submitted, and the directors agreed to give the per 'sonal endorsation asked for by the bank, and the secretary was ins- "tructed to have the said notes drawn out, signed as required, and "handed over to the Merchants' Bank."

In pursuance of that resolution the secretary of the company drew out two notes, for $8,500 and $4,500 respectively, which he signed as promissor on behalf of the company, the name of the appellant being inserted as payee, just as it had been in the demand note for $10,000 sent by the bank for signature and endorsation. Mr. Marler, one of the five directors of the company, was also the manager of the Merchants' Bank of Canada, in St. John's, and was precluded from signing any of these promissory notes by the regulations of the Bank. All the other directors endorsed the demand note for $10,000 (after it had been signed by the secretary for the company) in the following order, (1) the appellant, (2) the respondent, (3) Mr. Coote, (4) Mr. Macpherson. It does not

clearly appear whether Mr. Macpherson did or did not become a party to the two notes for $8,500 and $4,500; but these were certainly endorsed by the other three directors, in the same order in which their signatures were put on the $10,000 note. Neither does it appear at what dates these two bills for $8,500 and $4,500 were made payable; but it appears to their Lordships to be established that they were new discount bills, and that they were renewed on more than one subsequent occasion, the last renewal of the first of these notes having been made on the 21st March, and the last renewal of the second upon the 26th March, in the year 1877. These renewal bills were not signed by Macpherson, but they were endorsed by the appellant, by Mrs. Whitfield, per procuration of her husband the respondent, and by Mr. Coote, in the same order as before.

The letter of guarantee sent by the bank was subscribed by the appellant as well as by Messrs. Coote and Macpherson, and their names were inserted in the blank left for that purpose; but it was not signed by the respondent, nor was his name entered therein. When thus completed, the letter was handed to the bank along with the $10,000 demand note.

On the 27th December, 1877, the Merchants' Bank of Canada instituted a suit against the appellant, the respondent, and Mr. Coote, in the Court of Queen's Bench for Lower Canada, for recovery of the sums then due to the bank as holder for value of the said demand note for $10,000, dated the 24th July, 1875, and of the two renewal notes for $8,500 and $4,500, dated the 21st and 26th March, 1877. The demand of the bank was not resisted either by the appellant or by Mr. Coote but the respondent appeared and defended the action. After a variety of proceedings, which it is unnecessary for the purposes of this case to notice in detail, Mr. Justice Chagnon, on the 1st September, 1879, ordered the three defendants, jointly and severally, to pay to the bank the contents of the two notes of the 21st and 26th March, 1877; and also ordered the appellant and Mr. Coote, jointly and severally, to make payment to the bank of the contents of the demand note for $10,000.

On the 7th January, 1878, the respondent, availing himself of the provision of Article 1953 of the Civil Code, brough an action *en garantie*, before the same Court, against the appellant, concluding to have the appellant condemned, to acquit and relieve him of any sum of principal and interest, for which decree might be given against him in the suit at the instance of the bank. In the declaration filed by him in that action, the respondent treated the three promissory notes in question as if they had been ordinary commercial paper. His allegations, in regard to each of these notes, were in substantially the same terms, and after reciting the making of the note by the company, payable to the appellant, thus proceed :—

" Lequel billet la dite St. John's Stone China Ware Company remit

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au dit défendeur Edward Macdonald, qui là et alors signa et endossa le dit billet et le remit au dit demandeur en garantie George Whitfield, qui là et alors signa et endossa le dit billet et le remit au dit Isaac Coote, qui là et alors signa et endossa le dit billet et le remit à la dit Merchants Bank of Canada, qui en est encore porteur et propriétaire."

The plea founded by the respondent on that allegation was to the effect that the defendant,

"Etant, ainsi qu'il appert par les allegués ci-dessus, endosseur précédent et antérieur au dit demandeur en garantie, sur tous et chacun des trois billets plus haut mentionnés, est obligé et tenu en loi de rembourser, garantir et indemniser le dit demandeur en garantie de tous troubles et de toute condamnation qui pourrait intervenir contre lui, sur et à raison des dits billets, et dans et à raison de la dite action instituée par la dite Merchants' Bank of Canada."

In this action of warranty judgment was given by Mr. Justice Chagnon on the 1st September, 1879. The learned Judge held that the evidence given by the respondent himself, with regard to the circumstances in which these notes were made and endorsed, showed that the property of the notes was not passed by the endorsations, and that there was, in point of fact, no delivery by one endorser to another. And, inasmuch as that testimony, in his opinion, contradicted the allegations upon which the respondent's claim of indemnity was based, he dismissed the action as laid, reserving to the respondent any recourse which might be competent to him against the appellant.

An appeal was taken by the Merchants' Bank of Canada against the judgment of Mr. Justice Chagnon of the 1st September, 1879, in so far as it absolved the respondent from liability to the bank in respect of the demand note for $10,000. The respondent also appealed against the judgment of the same date, in his action *en garantie*. On the 18th June, 1881, the two actions were consolidated by an order of the Queen's Bench.

Thereafter, on the 23rd September, 1881, the Court of Queen's Bench gave judgment in the conjoined causes. The Court, in the suit at the instance of the bank, reformed the judgment of Mr. Justice Chagnon, and condemned the respondent in payment to the bank of the $10,000 demand note, with interest and costs. In the action at the respondent's instance, the Crown reversed the judgment appealed from, and condemned the appellant to guarantee, acquit and indemnify the respondent from all the condemnation in principal, interest and costs pronounced against him by the judgment in favor of the bank, and further condemned the appellant to pay to the respondent the whole costs incurred by him in the suit at the bank's instance. The present appeal has been brought against the judgment, in the action *en garantie*, of the 22nd September, 1881, by Edward Macdonald, the defendant in that action.

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The learned Judges of the Court of Quen's Bench were of opinion that the two promissory notes for $8,500 and $4,500, dated the 21st and 26th March, 1877, were mere renewals of notes which the company had, prior to the 24th July,1875,discounted with the bank, upon the endorsation of the appellant; and a finding to that effect is set forth as one of the considerations on which the formal judgment of the Court proceeds. Dorion,C. J., who delivered the judgment of the court,said, "the two notes of the 21 " and 26th of March, 1877, are renewals of other notes which, prior to " the 24th July, 1875, were endorsed by Macdonald alone."

The learned Judges were also of opinion that the note for $8,500 was the only one which the bank, by its letter of the 24th July, 1875, required from the Company, in order to cover its overdrafts upon current account; and, further, that it was the only note which the directors of the Company, by their resolution. embodied in the minute of 5th August, 1875, agreed to give, endorsed by them, to the bank. Upon this point Dorion, C. J., said:—" It is also to be remarked that the bank " merely asked the endorsement of the directors on a note for $8,500, " to cover the overdrawn account of the Company, and that by the reso- " lution it was only agreed to give the endorsation asked for, while the " note endorsed by the directors to cover the overdrawn account is for " $10,000; the resolution, therefore, does not apply to the note in ques- " tion, and cannot be invoked as containing an agreement on the part " of Whitfield (the respondent) to endorse this note of $10,000 as surety " for the Company."

The views thus expressed by the learned Chief Justice are, in the opinion of their Lordships, founded on a misconception of the true import of the written communication made by the bank to the Company on the 24th May, and of the action taken upon that communication by the directors of the Company on the 5th August, 1875. It must be borne in mind that the Company required a further credit, or in other words a further advance from the bank, and as the bank had not asked for the endorsements of the directors, except as a consideration for making the required advance, it is improbable that the directors agreed to give or gave their endorsations, without making provision for the Company getting, in exchange for these endorsations, the advance of $4,000 to $5,000, which the bank was willing to allow. If the note for $4,500, which the directors then endorsed, was a new note for discount then the Company got the advance, in respect of which they were asked, and presumably agreed, to give their endorsations upon the notes required by the bank. As regards the note for $8,500, the suggestion that the bank merely required the endorsements of directors upon it in order " to cover the overdrawn account of the Company " is inconsistent with the terms of the bank's letter, which states expressly that the $8,500 note was required, not " to cover," but " to reduce," the account. A renewal note could not possibly reduce the overdrafts. The plain

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import of the letter is that the bank required not a renewal but a new note for $8,500, which was to be discounted, and the proceeds, instead of being paid to the Company, applied in extinction *pro tanto* of these overdrafts, in order to bring the balance due below $10,000.

The evidence of Mr. Marler and of the appellant is to the effect that these two documents were new discount notes and not renewals, and their testimony is corroborated by that of the respondent himself. He was adduced as a witness for the appellant, and was examined in regard to the two notes for $8,500 and $4,500 bearing date 21st and 26th March, 1877. These were undoubtedly renewals of the two notes of that amount given to the bank in August, 1875, but the respondent did not assert that they were, as the learned Judges have assumed, "renewals " of other notes which, prior the 24th of July, 1875, were endorsed by " Macdonald alone." His statement is :—" The note for eight thousand " five hundred dollars and the one for four thousand five hundred, are " renewals for former notes of like amount between the same parties."

These facts, connected with the making and issue of the three promissory notes for $10,000, $8,500, and $4,500 in August, 1875, are only of importance in so far as they tend to explain the true legal relation in which the appellant and the respondent as parties to these notes, stand towards each other. The respondent maintains that, although neither of them gave or received value for the notes, but put their respective endorsations upon them for the accommodation of the St. John's Stone China Ware Company, the appellant, having first written his name upon the back of the notes, has thereby become liable to him, in the same manner, and to the same effect, as if he had been a prior endorser upon a proper commercial bill.

Had the appellant been, in point of fact, the holder of the notes, and had the respondent, in these circumstances, given his endorsement to the Merchants' Bank of Canada, which was about to discount them, the appellant would have been bound to indemnify the respondent against any demand made upon him by the Bank, or any subsequent holder, to the same extent as if the respondent had been a proper endorser. That was held to be the legal effect of such an endorsement in " Penny v. Innes " (1. C. M. & R. 439).

In the present case the appellant, although his endorsement was first written, was a stranger to the notes in the same sense as the respondent, and it is not matter of dispute that the endorsements of both were given for one and the same purpose, viz., in order to induce the bank to discount two of the notes, and pay the proceeds to the promissor, the St. John's Stone China Ware Company, and also to give the Company credit in account current to the amount of the third note. It was argued, however, for the respondent, that, in the absence of some special contract or agreement between them, *dehors* the notes themselves, strangers giving their endorsements successively must be held to have undertа-

ken the same liabilities *inter se* which are incumbent on successive holders and endorers of a note for value. The appellant and respondent must therefore, it was said, be assumed to stand towards each other in the relation of prior and subsequent endorsers for value, inasmuch as it had not been proved, *habili modo*, that they had specially agreed that their endorsements were to have the effect of making them co-sureties, seeing that their endorsements were made, without reference to the order of their signatures, in pursuance of a mutual agreement to give their joint guarantee to the bank that the notes would be duly retired by the Company.

Their Lordships see no reason to doubt that the liabilities, *inter se* of the successive endorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law-merchant. He who is proved or admitted to have made a prior endorsement must, according to these principles, indemnify subsequent endorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note, may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as endorsers ; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law-merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law-merchant, is not altered or affected by reference to such facts and circumstances, he may still obtain relief by showing that the party from whom he claims indemnity agreed to give it him : but, in that case, he sets up an independant and collateral guarantee, which he can only prove by means of a writing which will satisfy the Statute of Frauds.

The appellant has not attempted to establish an independent collateral agreement by the respondent, to contribute equally with him and the other endorsers, in the event of the Company's failure to make payment of the notes in question to the bank. He relies upon the facts proved with respect to the making and issue of these three promissory notes as sufficient in themselves to create the legal inference that all the directors of the Company, including the respondent, put their signatures upon the notes, in August, 1875, in pursuance of a mutual agreement to be co-sureties for the Company. And, in the opinion of their Lordships, that is the proper legal inference to be derived from the circumstances of the present case.

Their Lordships construe the bank letter of the 24th July, 1875, as

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preferring a direct request that the directors should become bound to the bank as co-sureties for the Company. The bank did not require that the appellant should become surety for the Company, that the respondent should then become surety for the appellant, and that Mr. Coote, in his turn, should guarantee the solvency of the respondent. What the bank asked was "the personal guarantee of your directors," and what the directors agreed to give at their meeting on the 5th August, 1875, was "the personal endorsation required by the bank." Apart from the mere circumstances of the order in which the endorsements were made, the *res gestæ* of the meeting of 5th August, as disclosed in evidence, make it perfectly plain that the directors were asked and agreed to become co-sureties for the Company, without any stipulation whatever as to their becoming *inter se* sureties for each other, or as to the order of their endorsing. Their Lordships attach no weight to the terms of the so called letter of guarantee which was returned to the bank, along with the demand note for $10,000, or to the fact that it was not signed by the respondent. The letter contains no obligation of guarantee, and simply explains, what would otherwise have sufficiently appeared from the bank's own letter, that the $10,000 note was not for immediate discount, but was to be held by the bank as a collateral security for the Company's debit balance in account current.

But the respondent insists, and the Court below seem to have held, that, in determining the rights and liabities *inter se* of these endorsers for the accommodation of the Company, regard must be had, not to the contract in pursuance of which they became endorsers, but to the order of their endorsements, as evincing the terms of their contract. That doctrine appears to their Lordships to be at variance with the principles of the English law. In a case like the present, the signing of their names on the note, by way of endorsement, in order to induce the bank to discount it to the promissor, is not as between the endorsers, *pars contractus*, but is merely the performance by them of an antecedent agreement. The terms of that previous contract must settle their liabilities *inter se*, irrespective altogether of the rules of the law-merchant, which will nevertheless be binding upon them in any question with parties to the note who were not likewise parties to the agreement. The law upon this point was correctly laid down by the Court of Common Pleas in Reynolds v. Wheeler, 10 C. B. (N.) 561. In that case, one Cheeseman drew a bill, and asked Reynolds to accept it for his accommodation, which Reynolds did. The bank refused to discount, whereupon Wheeler, at the request of Cheeseman, endorsed, and the bill was then discounted, Cheeseman receiving the proceeds. The bill was renewed at maturity, Reynolds, on this occasion, being drawer and Cheeseman acceptor, whilst Wheeler endorsed it as he had done before. Reynolds paid the renewal bill, and claimed contribution from Wheeler as a surety with him for the same debt. Wheeler resisted the claim on the same

plea which is put forward by the respondent in the present case, viz., that, in the circumstances, he had only agreed to undertake the liability evidenced by the endorsement, and consequently he was not liable in relief or contribution to one who, like Reynolds, had previously become party to the bill as drawer or acceptor. But the Court overruled the plea. Erle, C. J., said, "The substance of the transaction is this:—Cheeseman "was in want of money, and applied to Reynolds and to Wheeler to "lend him their names in order to obtain it. If the money had been "raised by the joint and several note or bond of the three, it could not "have for a moment been contended that Reynolds, paying the whole, "would not have been entitled to contribution. The machinery adopted "here was the drawing of a note by Cheeseman upon Reynolds, and the "endorsement of it by Wheeler." And Williams, J., stating the law to the same effect, said, "If the relation of surety subsists he (Reynolds) "is entitled to contribution, and we are entitled to disregard the form "of the instrument." Macdonald & Whitfield.

In the present case the directors of the St. John's Stone China Ware Company one and all agreed with each to become sureties to the bank for the same debts of the Company. That was the substance of the agreement to which they came on the 5th August, 1875, and the fact that the machinery which they adopted for carrying out their agrement was the making of three promissory notes by the Company, payable to the appellant, and successively endorsed by him and his co directors, cannot have, in law, the effect of altering the mutual relations established by that agreement, and of substituting for these the liabilities of proper endorsers of an ordinary commercial note.

It was argued, however, that the respondent gave his endorsement at the request of the appellant, and must, therefore, be held to have given them on the faith of his having recourse against the appellant as a prior endorser. That contention was rested upon certain statements made by the respondent in his deposition as a witness for the appellant. He stated, "I was asked to endorse the notes in question by Edward "Macdonald, in fact urged to do so, to sign them, thas it was all right, "which I did." Again, in answer to the question by his own counsel, "At whose instance did you endorse the notes in question?" he says, "At the instance of Edward Macdonald." The argument is really without foundation in fact. There is not a word in those statements to suggest that the appellant, Edward Macdonald, did anything more than urge the respondent to carry out the agreement which had already been come to by all the directors present in order to aid the finances of the Company.

The authority of Reynolds *v.* Wheeler, and similar cases, is in no wise affected by the decision of the House of Lords in the Scotch case of Steele *v.* Mackinley, which is referred to in the judgment of the Court below. In that case A, acting on behalf of his sons B and C, arranged

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with D that the latter should make an advance to them of 1,000*l.* upon their personal security. D accordingly drew a bill for that amount on B and C, and delivered it to A, in order that he might procure their acceptance. A did obtain their acceptances, and before returning the accepted bill to D, he wrote his own name upon the back of it. The acceptors failed to retire the bill, and D, the drawer, brought an action against the representative of A (who had died in the meantime) for recovery of its contents, upon the allegation that A had signed as a co-acceptor, or at all events with the intention and effect of becoming a surety to him for the acceptors. Parole evidence was made, not only in regard to the making and issue of the bill, but also in regard to statements made at various times by the deceased, tending to prove a separate and independant engagement by him to guarantee payment of the bill by his sons. The admissibility of the evidence, so far as it bore upon the facts and circumstances connected with the making and endorsement of the bill, was not questioned either at the bar or by the House. On the contrary, the House did take that evidence into account, although it was ultimately held that the claim preferred by D was neither supported by the principles of the law-merchant, nor by any inference derivable from these facts and circumstances. But the House rejected the parole evidence adduced by D in order to establish an independent contract of guarantee, upon the ground that such a contract could only be proved by a writing properly signed under the 6th section of the "Mercantile Law Amendment (Scotland) Act, 1856," which extends to Scotland the provisions of the English Statute of Frauds with respect to mercantile guarantees.

The respondent's counsel, in the course of the argument, referred to the case of "Jansen *v.* Paxton" (28 C. P., U. C., 439), decided by the Court of Error and Appeal in Upper Canada, and to three other decisions of the Canadian Courts. With the same view, they cited the case of "Macdonald *v.* Magruder," decided in 1830 by the Court of New York, United States (3 Peters, 470, and 8 Curtis, 491). These authorities were relied upon as establishing the doctrine that, where several persons mutually agree to give their endorsements on a bill, as securities for the holder who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper endorsers, liable to indemnify each other successively, according to the priority of their endorsements, unless it had been specially stipulated that they were to be liable as co-sureties. It is unnecessary to enter into a minute criticism of these cases. Some of them are, in their circumstances, distinguishable from the present case; but there are undoubtedly to be found in the opinions of the learned Judges by whom they were decided *dicta* which seem to recognize the doctrine contended for by the respondent. If they are to be regarded as authorities to that effect, their Lordships

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cannot accept these cases as conclusive of the law of England, or as precedents which ought to govern the decision of this appeal. The Civil Code of Lower Canada (Article 2340) enacts that "in all matters relating "to bills of exchange not provided for in the Code, recourse must be "had to the laws of England in force on the 30th day of May, 1849." By Article 2346 of the Code, the same law is made applicable to promissory notes as to bills of exchange, in so far as regards the liability of the parties; and seeing that the Code makes no provision regarding the question raised between the appellant and respondent, that question must, in the opinion of their Lordships, be decided according to the law of England, as laid down by the Court of Common Pleas in "Reynolds *v.* Wheeler."

Their Lordships will, accordingly, advise Her Majesty that the judgment appealed from ought to be reversed; and that the action *en garantie* at the respondent's instance ought to be dismissed, with the declaration that the appellant and the respondent made their several endorsements upon the promissory notes in question, along with other directors of the St. John's Stone China Ware Company, as co-securities for the said Company, and are, in that capacity, entitled and liable to equal contribution *inter se*.

The respondent must pay to the appellant the costs of this appeal, and also the costs incurred by him in the Courts below.

Judgment of the Court of Queen's Bench, Montreal, reversed.

PRIVY COUNCIL.

London, July 18, 1885.

McGibbon & Abbott.

Coram LORD WATSON, LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD COUCH.

McGIBBON *v.* ABBOTT.

PER CURIAM.—This is an appeal from a decision of the Court of Queen's Bench for Lower Canada, in the Province of Quebec, which reversed a decision of the Superior Court in that province in favour of the plaintiff, who is now the appellant. He sued in the character of tutor *aux biens* of Humphrey Gordon Eversley Macrae, a minor, whom it will be convenient for the purpose of this judgment to treat as the plaintiff.

It appears that the late William Macrae, who was domiciled in Lower Canada, executed his last will at Montreal on the 3rd March 1868, in the Engli-h language.

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The twelfth clause of the will was in the following words:—

"I give and bequeath unto my executors herein-after named for the use, benefit, and behalf of the children issue of the present or any future marriage of my son John Octavius Macrae, one-third of the residue and remainder of my estate and succession, to have and to hold the same upon trust: firstly, to invest the proceeds thereof in such securities as to them shall seem sufficient, and from time to time to remove and re-invest the same, and during the life of my said son, John Octavius Macrae, to pay the rents and revenues derived therefrom, to my said son, for his maintenance and support, and for the maintenance and support of his family: and secondly, upon the death of the said John Octavius Macrae, then the capital thereof, to his children in such proportion as my said son shall decide by his last will and testament, but in default of such decision, then share and share alike as their absolute property for ever; And I hereby will and ordain that my said son, John Octavius Macrae, shall have the right to receive the said revenues and profits for his maintenance as aforesaid, without their being subject to seizure for any debts created, or due, or payable by him, but shall be deemed and are hereby declared to have been given as an alimentary provision for his support, and that of his family, and *insaisissables*."

It will be convenient in this judgment to call the father "William" and the son "John." John was twice married, first in 1859, and secondly on the 20th November 1879. He died on the 12th May 1881, leaving four children the issue of his first marriage, viz., Lucy Caroline Macrae, now of age and one of the respondents in this case, John Ogilvy Macrae, Ada Beatrice Macrae, Catherine Alice Lennox Macrae, and Humphrey Gordon Eversley Macrae, the plaintiff, the issue of the second marriage, who was born on the 25th January, 1881, and is the appellant.

John, by his will dated the 5th April, 1880, directed and appointed that his son John Ogilvy Macrae and his three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, should be entitled equally, share and share alike, to the trust fund over which he had a power of appointment under his father's will; and by a subsequent provision of his will he bequeathed to his second wife the usufruct of all his property beyond the trust fund and the amount comprised in the settlement made on his first marriage, and to all of his children, including any who might be born after his second marriage, the capital of such other property, share and share alike.

It is evident that the intention of William was to tie up the capital of the share of his son John for the benefit of John's children as a class after his death. William, when he made his will, could not foresee what children John might have at the time of his death, or what might be their respective wants or requirements. He did not, therefore, attempt to specify in what proportion the capital should be divided, but he left that to the decision of his son, who would naturally be better acquainted

with the circumstances of his own children. For example, John, during his lifetime, might make advances to some of his children, as it appears from another part of the will the testator himself had done with regard to his own sons George and John, and to his daughter Catherine, and not to others. Some of the children might be otherwise amply provided for, and might need no portion of the property left by their grandfather. It is contended, however, and was contended in the Courts below, that John was bound to give some share. however small, to each of his children, and that, according to the intentions of William as expressed by his will, in default of his doing so, all the children were entitled under it to take in equal shares.

The case was heard in the first instance in the Superior Court, when Mr. Justice Torrance decided in accordance with that view of the case.

On appeal to the Court of Queen's Bench, that Court, consisting of Chief Justice Dorion and four other Judges, reversed the decision of the Superior Court, and unanimously held that John had not only the right to apportion the capital between all his children, as well those of his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others, as he had done by will. From that judgment the plaintiff has appealed to Her Majesty in Council, for the following amongst other reasons :—

1. By the law of Lower Canada the Court is bound to give effect to the intention of the testator as evidenced by the whole will. *Martin* v. *Lee*, 14 Moore, P.C.C., 142.

2. That in the case of a will in the English language and couched in English legal phraseology, it was proper for the Courts of Lower Canada, in accordance with the case of *Martin* v. *Lee*, to have regard to the meaning and effect of that phraseology in the English language and law at the date of the will, in order to arrive at the intention of the testator.

3. That at the date of the execution of the will and down to and at the date of the death of the testator, the language of the said will would by the law of England, as it then stood, have given no right to John Octavius Macrae to exclude any of his children, but only to direct the proportions in which they would share.

4. That it appears from the will to have been the intention of the testator to benefit all his said grandchildren, and to give their father a power only to apportion but not to exclude.

5. That there is nothing in the law of Lower Canada opposed to this construction or to this intention.

The reasons of Mr. Justice Ramsay for his judgment in the Court of Appeal are set out in the supplemental record, and it appears from a letter from the Clerk of Appeals at Montreal to the Registrar of the Privy Council that Mr. Justice Ramsay rendered the unanimous judgment of the Court of Appeal, and that the other Judges have no notes, and have not sent any reasons for their concurrence in the judgment.

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As to the first reason for the appeal to Her Majesty in Council, there can be no doubt that, according to the law of Lower Canada as well as according to the law of England, "the paramount duty of the Courts" (to use the words of Lord Justice Turner in the case of *Martin* v. *Lee*, 17 Moore's Privy Council Cases, 153) "is to ascertain and give "effect to the intention of a testator to be collected from the whole "will, and not from any particular word or expression which may be "contained in it." But it is not their duty, by adhering to the strict letter of a will, so to construe general words as in the absence of clear and unambiguous language to impute to a testator an unreasonable intention.

The doctrine of the English Courts of Equity as to illusory or unsubstantial appointments under a power is not, and never was, any part of the old French, law or of the law of Lower Canada, nor is it included in any of the Articles of Chapter 4 of the Civil Code of Canada, relating to substitutions.

The question whether John could exclude any one of his children from a share must, in their Lordships' opinion, be decided according to the law of Lower Canada, and not according to the English law. They do not understand the case of *Martin* v. *Lee* as deciding that a will executed in Lower Canada by a person domiciled in Lower Canada, if written in English, must be interpreted with regard either to moveable or immoveable property in Lower Canada according to the rules of English law, and have the same effect given to the phraseology as if that phraseology had been contained in a will executed in England by a person domiciled in England, or relating to land or other property in England. All that they understand that case to decide is that the word "children," used as it was in the will then to be interpreted, was not intended to have the more extensive meaning which may sometimes be given to the word "*enfants*" in the old French law. Lord Justice Turner, at p. 154, said: "The true question therefore in this case is not "whether the word '*enfants*' may include grandchildren and even "more remote descendants, but whether upon the true construction of "this will it was intended to include them." See also the remarks at at pp. 154 and 155.

It could never have been intended by their Lordships to lay down a rule of construction which might render it necessary to apply the rule in Shelley's case to a conveyance or devise written in the English language of lands in lower Canada to a man for life, with a substitution in favor of his heirs upon his death.

The question to be considered is whether, according to the law of Lower Canada, the gift in the will of William, by the words, "and, "secondly, upon the death of the said John Octavius Macrae, the capital "thereof to his children in such proportion as my son shall decide by "his last will and testament," contained an exclusive or non-exclusive

power. It may be said that, according to the words taken in their strict grammatical sense, each child was entitled to a share; but it is to be borne in mind that, as the old English rule of equity as to illusory appointments was not in force in Lower Canada, John. even if the power is to be construed as non-exclusive, might have given a share of one cent each to four of the children, and the whole of the remainder to the other. In other words, that $100,000, the amount at which the property is valued by the plaintiff, *minus* four cents, might have been given to one of the children, and one cent, or a share in the proportion of one to ten millions, might have been given to each of the others.

It is to be observed that at the date of his will John had only the four children, amongst whom he thereby decided that the property charged should be divided. His decision at the time was quite in accordance with the will of his father, whatever construction is to be put upon it. He was not bound at that time to make by general words provision for a child who might be afterwards born. He was not bound to make his decision *uno flattu* (see *Cunningham* v. *Anstruther*, 2 Law Reports, Scotch and Divorce Appeals, p. 223). He might have revoked the will and made a new will, or he might have amended it by a codicil; and all doubt as to the validity of the will which was made before the birth of the plaintiff would have been removed if John had executed a codicil amending his will by giving one cent to the plaintiff, and the remainder to the four children named in the will.

William, if he had pleased, might have provided by express words that each child of John should have a share, and that no share should be less than a certain amount, but he was not prepared to fix the amount of the shares. To hold that when be left to his son to fix the proportion he intended to render it compulsory upon him to give each child a share, though it should only be in the proportion of one to ten millions, would be to impute to him a most unreasonable intention. To do so would violate the rule of interpretation, *Qui hæret in litera hæret in cortice.*"

In England, Lord Alvanley, in the case of *Kemp* v. *Kemp* (5 Ves. Jun., 861), in holding a power to be non-exclusive upon finding a current of authorities against the words being construed as giving an exclusive power, observed: "My inclination is strong to support the execution of "the power if I could consistently with the rules I find establised;" and on referring to the case of *Burrell* v. *Burrell*, in which a testator gave all his real and personal estate to his wife, to the end that she "might *give his children such fortune as she should think proper*," remarked; "Lord Camden, as I conceive, was of opinion that these "words were so ample that if she thought fit to give nothing to one she "might so execute the power. I am willing to subscribe to that opinion "of Lord Camden upon such a doubtful question, being perfectly "satisfied that in setting aside these appointments, by criticising the

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" words ' to and amongst,' &c., and the rule as to illusory shares, the " Court goes against the intention. I must therefore think that, under " the words of that will, Lord Camden thought that the wife might have " given the whole to one child, and had a right to exclude any who, in " her opinion, did not want it." In the case then before him, Lord Alvanley held that the power was non-exclusive, but at the conclusion of his judgment, having given his reasons at length, he added: " For " these reasons, but with less satisfaction than I have had in any other " judgment that I have given, being satisfied that the person creating " the power meant a much larger power than I can hold the person " executing it had, I must declare the appointment void."

In Sugden on Powers it is said, " In many cases an exclusive " appointment may be authorized by the apparent intention of the " donor, although no words of exclusion are expressly used. Thus, he " says, in *Bovil* v. *Rich*, 1 Chan. Cases, 309, the testator gave all the " rest of his estate to A B in trust, to give my children and grandchildren " according to their demerits.' A B gave the estate to one, excluding " the rest. Lord Nottingham refused to set aside the appointment, as ' the children were to come in by the act of the devisee, and he was to " give or distribute according to their demerits, therefore he was to " judge." So in the present case John was charged with the fiduciary substitution and was to decide.

It was contended in the argument at the bar that John could not properly decide with reference to the plaintiff without considering his case, and that as his will was executed before the plaintiff was born he must have decided without considering. This is not so. He had the power to revoke or alter his will, and if he had thought that the plaintiff ought to have a substantially proportionate share, or even a nominal share, he could have decided in his favour by a codicil. In Domat's Civil Law, Part 2, Book 5, para. 3877, it is said, and with very good reason, " If he who was charged with a fiduciary bequest or substitution at the " time of his death in favour of some one of his children whom he should " think fit to choose, has given in his lifetime, to one of his children, " the things which were subject to the fiduciary trust, this donation " would be in the place of an election if the same were not revoked. " For although the liberty of this choice ought to last until the time of " the death of the person charged with the fiduciary substitution, and it " was for the interests of all the children that the said donation should " not destroy the said liberty, yet it would be sufficient that the donee " had been made choice of, and that the said choice had not been " revoked; seeing the choice would be confirmed by the will of him " who, having it in his power to make another choice, had not done so. " So it would be the same thing as if the choice had been made at the " time of his death."

The courts in Lower Canada are not bound by the current of

decisions in England, as the judges in England before 1874, and Lord Alvanley in the case of *Kemp* v. *Kemp*, considered themselves to be bound in deciding whether a power was inclusive or non-exclusive. Even in England those decisions had caused so much inconvenience that it was found necessary to ressort to legislation upon the subject, and the law was amended by Act 37 & 38 Vict., c. 37.

A similar Act was not necessary in Lower Canada. The Courts there were not trammelled by the current of authorities to which Lord Alvanley and other judges in England were forced to yield.

Judge Ramsay, in his written reasons, says, and says with some force, speaking of the law of England before 1874, "It is only by the "help of repeated legislation, that the law there has come down to that "reason from which I apprehend our law starts. It was therefore quite "unnecessary for us to make any Act similar to the English Act 37 & 38 Vict., c. 37."

Mr. Justice Ramsay also, in his reasons, states that, "Under the "Roman law and under the old *régime* of France there was a great "questions as to the effect of the substitution of the children or of a "class, as for instance the relations, and that at last it seems to have "been determined that when the children of the *grevé* were called "*nominatim* they held of the original testator, and that the father "could not effect the disposition; but that when the children were "called collectively, there was a difference of opinion as to whether the "father could select among the children so as to give to some and "exclude others." He adds, "Although the affirmative of the proposi- "tion cannot be supported on a strictly legal argument, it seems to "have prevailed." He then cites some authorities in support of his argument.

Their Lordships are not prepared to say that that exposition of the law is not correct. If, then, a man to whom an estate is given for life, charged with a substitution in favour of his children after his death, can substitute one or more of his children to the exclusion of others, the addition of the words in the present case, "in such proportion as he "shall decide," does not affect the nature or substance of the substitution. It only gives power to the father to do that which he could have done under the general words of the substitution in favour of his children.

It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the Legislature as fraught with inconvenience and mischief, and thus be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to

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remove. In their Lordships' opinion the decision of the Court of Queen's Bench is correct. They will therefore humbly advise Her Majesty to affirm the judgment of that Court.

The appellant must pay the costs of this appeal.

Judgment affirmed.

Bompas, Q.C., and *McLeod Fullarton* for appellant.

Macnaughten, Q.C., and *Jeune* for respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Morrison & City of Montreal.

Dec. 10, 1877.

Present: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT, P. COLLIER.

MORRISON *et al v.* THE CITY OF MONTREAL.

Their Lordships are called upon in this appeal to reverse two judgments in the Court of Queen's Bench of Quebec with reference to the amount of compensation to be paid by the respondents, the Corporation of the City of Montréal, to the appellants, as proprietors of certain landt expropriated for the purpose of forming a park, to be called Mouns Royal Park.

It appears that, by an Act of the Colonial Legislature, 27 and 28 Vict., cap. 60, the Corporation were authorized to make very extensive improvements in the City of Montreal, and for that purpose to take lands compulsorily. By the preamble it was recited that the then exising law of expropriation led to great delays, and by section 13 a new mode of assessing compensation was provided.

By that section it was enacted that in case the Corporation should not be able to come to an amicable arrangement with the persons interested in the ground or real property required to be taken, as the price or compensation to be paid for the same, the Superior Court of Lower Canada for the district of Montreal, or a Judge thereof, should appoint three competent and disinterested persons as commissioners to fix and determine the price or compensation to be allowed for such land or real property, and that the Court or Judge should fix the day on which the commissioners should commence their operations, and also the day on which they should make their report.

By sub-section 5 of that section, the Commissioners, before proceeding, were to be duly sworn, and they were vested with the same duties as were conferred by the laws in force in Lower Canada upon experts in reference to appraisements, one of those duties being to view the property to be appraised.

By sub-section 7 it was enacted that it should be the duty of the Commissioners to diligently proceed to appraise and determine the amount of the price indemnity or compensation which they should deem reasonable, and they were thereby authorized and required to hear the parties and to examine and interrogate their witnesses, as well as the members of the Council and the witnesses of the Corporation; but it was declared that the said examination and interrogatories should be made *viva voce* and not in writing, and consequently should not form part of the report to be made by the Commissioners. The section then provided that it, in the discharge of the duties devolving upon the Commissioners, there should occur a difference of opinion between them, the decision of two of the Commissioners should have the same force and effect as if all the said Commissioners had concurred therein.

Sub-section 12 was as follows :—

" On the day fixed in and by the judgment appointing the said Commissioners the Corporation of the said city, by their attorney or counsel, shall submit to the said Superior Court, or to one of the Judges there of respectively, the report containing the appraisement of the said Commissioners, for the purpose of being confirmed and homologated to all intents and purposes; and the said Court or Judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, shall pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested, and consequently not open to any appeal.

That sub-section was afterwards amended by the 35 Vict., cap. 32, sec. 7, which contained, amongst other things, the following words :—

" Sub-section 12 of clause 13 of the Act 27th and 28th Victoria, chapter 60, is amended by adding at the end of the said clause the following words, to wit : " for the purposes of the expropriation; " but in case of error upon the amount of the indemnity only on the part of the Commissioners, the party expropriated, his heirs and assigns, and the said Corporation, may proceed by direct action in the ordinary manner to obtain the augmentation or reduction of the indemnity, as the case may be, and the party expropriated shall institute such action within fifteen days after the homologation of the report of the said Commissioners, and if upon such action the plaintiffs succeed, the Corporation shall deposit in Court the amount of the condemnation to be paid to the party or parties entitled thereto."

By the 32 Vict., cap. 70 (Quebec Statutes) power was given to the Corporation to form a park, to be called " Mount Royal Park," and by section 20 it was enacted that all the land required for the park should be deemed to be within the city, and that all the powers of expropriation possessed by the Corporation of Montreal should extend to it. By section 23, however, an alteration was made as to the mode of appointing the Commissioners to value the property to be expropriated, and it was enacted that one should be appointed by the Corporation, one by the party whose property should be expropriated, and the third by a Judge of the Superior Court.

Such being the State of the law, the Corporation on the 14th March

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1873, gave notice of their intention to take an estate of which the appellants were the owners, called "The Mount Tranquil Estate." The estate contained 3,543,104 superficial feet, equal to about 96 arpents and 28-100 and Commissioners were appointed to fix the price or compensation to be paid for the same. The Commissioners were Alexander McGibbon Esq., on behalf of the Corporation; John McLennan, Esq., appointed by the appellants, and Robert W. Shepherd, Esq., appointed by a Judge of the SuperiorCourt.

There may be a slight difference between a superficial foot in Canada and a superficial foot in England; but it will be sufficiently accurate for the purpose of this case to consider a superficial foot in Canada as equal to a superficial foot in England, and to treat the total quantity of land to be expropriated as amounting to about 81 English acres and a fraction.

On the 26th June, 1873, the Commissioners made a unanimous report by which they fixed $219,000 as the amount to be paid as compensation. On the 5th July, 1873, the report was homologated, and confirmed by hon. Mr. Justice Torrance, one of the Judges of the Superior Court, after due proof adduced of the observance of all the formalities and proceedings required by the 27 and 28 Vict., cap. 60, and the 32 Vict., cap. 70.

On the 18th July, 1873, the plaintiffs commenced an action against the respondents of the Superior Court for Lower Canada, alleging in their declaration that, in awarding the sum of $210,000, the Commissioners had fallen into error upon the amount of indemnity, and that they ought to have awarded the sum of $539,920, which was the true value of the property for purposes of expropriation.

The defendants, by their plea, denied that there was any error so far as the plaintiffs were concerned or interested, and alleged that the sum of $210,000 was, and is, in excess of the real value of the property.

The case was tried in the Superior Court by the Hon. Mr. Justice Johnson, who awarded to the plaintiffs the sum of $245,000, in addition to the amount of of $210,000 previously paid under the award of the Commissioners. From that judgment the defendants, the present respondents, appealed to the Court of Queen's Bench for the Province of Quebec, and the plaintiffs, the present appellants, presented a cross appeal, seeking to augment the sum awarded to them by the Superior Court by the sum of $429,000, making the amount $100,000 in excess of the amount claimed by them in their action.

The appeal and cross appeal were heard together, and on the 22nd June, the Court of Queen's Bench reversed the judgment of the Superior Court and dismissed the action of the plaintiffs. The Hon. Mr. Justice Monk and the Hon. Mr Justice Ramsay, two of the Judges of the Court of Queen's Bench, dissented from the judgment of the majority of the Judges of that Court.

It was contended on behalf of the respondents that, in order to maintain an action upon the ground of error on the part of the Commissioners in respect of the amount of the indemnity, it must be shown that the award of the Commissioners was erroneous with reference to the evidence which was adduced before them. It has, however, been held in the Court of Appeal in Canada, in the case of *Montreal v. Bagg*, 19 Lower Canada Jurist, 136, and also in the present case, one learned Judge only dissenting, that whenever it can be shown that the Commissioners have arrived at a wrong conclusion with respect to the value of the property or the amount of compensation, the party expropriated is entitled to maintain an action to obtain an augmentation of the indemnity. Their Lordships are clearly of opinion that that is the proper construction of the Statute. The construction contended for is wholly inconsistent with the 27 and 28 Vict., cap. 60, sec. 13, cl. 7, by which it was enacted that the examination of the witnesses should not form part of the report of the Commissioners, and also with the 7th section of the 35 Vict., cap. 32, by which the party expropriated is authorized, in the case of error on the part of the Commissioners, to proceed "by direct action in the ordinary manner" to obtain an augmentation of the indemnity, which necessarily includes the right to adduce evidence in support of the action.

The substantial question to be determined in this appeal, therefore, is whether the evidence adduced in the action was sufficient to prove that there was error on the part of the Commissionners as regards the amount of the indemnity awarded by them. In determining that question, their Lordships are of opinion that the prospective capabilities of the land ought to be taken into account, and that for the purpose of this appeal, it may be assumed that some enhancement of price ought to be made upon the ground of the proprietors being obliged to part with their land compulsorily.

It was urged that at the time when the Commissioners made their award it had been determined by the Superior Court that, in valuing land for the purpose of expropriation, the prospective capabilities were not to be taken into consideration; and that, although that decision was reversed on appeal to Her Majesty in Council, the appeal had not been decided at the time when the Commissioners made their reports, and that it must be assumed that the Commissioners did not take into consideration the prospective capabilities.

The Commissioners in their report are silent as to their reasons; but their Lordship having regard to the evidence adduced before the Commissioners and to the amount awarded by them, viz., $210,000, cannot suppose that the Commissioners excluded from their consideration the prospective capabilities, or the fact that the expropriation was compulsory. Calculating the dollar at 4s, the sum awarded was equal to £42,000, which for 82 acres was at the rate of nearly £520 an acre for the

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land, which at the time of the expropriation was producing but little, if any, profit.

The $245,000 awarded by the learned Judge in addition to the $210,000 awarded by the Commissioners make a total of $455,005, which at 4s· a dollar is equal to £91,000, or upwards of £1,120 an acre for each of the 81 acres, of which some of the witnesses stated that not more than one-half was fit for building purposes.

The learned Judge held very properly that the only question before him was one of fact, which must be determined by the evidence given in his presence.

The real issue, at it appears to their Lordships, is was there error on the part of the Commissioners in awarding only the sum of $210,000, and, if so, to what extent were the plaintiffs entitled to an augmentation of it ?

The report of the Commissioners, which under the former law would have been final, must, notwithstanding the alteration of the law, be considered correct until it is proved to be erroneous. The onus of proving error on the part of the Commissioners lay upon the plaintiffs. The judgment of the Commissioners, as expressed in their report, was entitled to great weight. It is not in this case merely the judgment of a majority. The report was unanimous, and was one in which the Commissioner appointed by the appellants themselves concurred. Their Lordships are of opinion that it should not be lightly overturned, and that the learned Judge did not give sufficient weight to it. He treated the question before him as he would have done if he had had to assess the amount of compensation in the first instance. He said he must determine it according to the evidence which he had heard, and by which he considered himself to be bound as absolutely as he would be by evidence proving the items of a tradesman's bill.

Treating the subject in that manner, the opinion of the Commissioners had no more weight attached to it than if they had made no report at all. In another part of his judgment the learned Judge remarked:—" I have to judge according to the evidence. As I view the case, the law no more makes me judge of the value of real estate, apart from the sworn evidence before me, than it makes me judge of the value of pork, or flour, or any other thing of which the value is in question before me. In the one case, as in the other, I can only know what is proved. If this evidence is untrue, it was the business of the defendants to contradict it, which they have not done. If it is true, I have done no injustice in acting upon it."

The learned Judge seems to have taken too narrow a view of his functions. It was his duty to make use of his own judgment and experience in deciding whether the opinions of the witnesses were sufficient to outweigh the judgment of the Commissioners. In their Lordship's opinion the learned Judge attached too much importance to the opinions

of witnesses, which were chiefly of a speculative character; and they have to observe that the amount awarded by him exceeded the valuation of some of the claimant's own witnesses. Morrison & City of Montreal

Their Lordships, therefore, concur with the majority of the judges of the Court of Queen's Bench in the opinion that the judgment of the learned Judge of the Superior Court cannot be sustained. This being so, they are driven to the alternative of either affirming the judgments of the Court of Queen's Bench or of themselves fixing the amount of indemnity which ought to be paid. Notwithstanding the obvious inconvenience of the latter course, they would consider it their duty to adopt it if they saw clear proof that there had been a miscarriage of justice. But having listened with great attention to the arguments of the learned counsel for both parties, and having weighed with great care all the evidence in the cause, they have come to the conclusion that they would not be justified in declaring against the opinion of the majority of the judges of the Court of Queen's Bench that there was error on the part of the Commissioners with regard to the amount of indemnity determined by them.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench and to dismiss this appeal. The appellants must pay the costs of the appeal.

PRIVY COUNCIL.

London, July 18, 1885.

Coram Lord Watson, Lord Monkswell, Lord Hobhouse, Sir Barnes Peacock, Sir Richard Couch.

PREVOST *v.* LA COMPAGNIE DE FIVE-LILLE. Prevost & Cie de Five-Lille

Per Curiam. The respondents, La Compagnie de Five-Lille, on the 25th May 1882, recovered judgment in the Superior Court of Lower Canada against the Union Sucrière Franco-Canadienne, for $33,293.00, with interest; and on the 10th June 1882, a writ of *fieri facias* was duly issued to the sheriff of the district of Richelieu, directing him to levy that sum upon the property, real and personal, of the judgment debtors. The sheriff, in execution of the writ, seized certain buildings, with the fixed machinery therein, belonging to the judgment debtors, which had been erected and used by them for the manufacture of beet-root sugar, situated in the parish of Berthier and district of Richelieu, and advertised the same for sale, as an *immeuble*, upon the 28th August 1882.

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On the morning of the day of sale, John Lewis, an officer of the customs at Montreal, intimated to the sheriff, by letter, that the fixed machinery of the sugar factory was held by the Crown, under bond, for unpaid import duties, and could not be sold, unless subject to the condition that time duties were to be paid before any part of the machinery was removed from the premises. The claim thus asserted on behalf of the Crown became known to the appellant, Arthur Prévost, as well as to many other persons, who attended, on the 28th August 1882, for the purpose of bidding at the sale. Accordingly, the appellant Prévost, before the bidding commenced, ashed the sheriff whether the property was to be sold free of all charges, to which the sheriff answered, "Yes." The bidding then went on; and eventually the property was knocked down, and adjudicated to the appellant, at the price of $76,000. That the sale was conducted, and the purchase made by the appellant, on the distinct footing that the property was sold free of all charges, is made perfectly clear by the return of the sheriff, in which he expressly states that he disregarded the intimation given to him by Lewis, being of opinion that he had no authority to give effect to the condition which the Crown sought to impose.

On the 29th August 1882, the day after the sale, the custom's authorities acting in virtue of a formal *bref d'assistance*, seized the whole machinery in the sugar factory, and placed it under the charge of one of their officers. Thenceforth, the machinery remained in the custody and possession of the Crown authorities, who refused to give delivery, or to allow delivery to be made to any one until the whole import duties chargeable in respect of the machinery were paid, although they expressed their wi lingness to give access to the machinery for the popeurs of cleaning and preserving it. They alleged that the factory had been duly constituted a custom or bonded warehouse, for the safe-keeping of the machinery, by an Act of the Governor in Council, in terms of the Dominion Customs Act, 40 Vict., cap. 10; that the sale, so far as regarded the machinery, was void, inasmuch as it was in the possession of the Crown, and not of the judgment debtors; and, at all events, that so long as it remained in the factory which had been constituted a warehouse within the meaning of the Customs Act, no sale by the sheriff could defeat the right of the Crown to retain the custody of the machinery until the import duties were paid.

In terms of Article 687 of the Procedure Code, the purchaser at a sale by the sheriff in execution is bound to pay the price within three days. On the lapse of that time, the sheriff, before making his return, addressed a letter to the appellant, requiring him to make payment of the price; and received a reply, through a solicitor, to the effect that the appellant was not prepared to pay, because the sheriff was unable to make delivery to him of the property which he had purchased.

On the 3rd October, 1882, the appellant presented a petition to the

Superior Court, craving that the sheriff's *décret* of the 28th August, adjudging the property to him, should be annulled, and the sale declared to be void; or, otherwise, that he should be relieved of his obligation to pay the purchase money. The respondent Company, as judgment creditor, opposed the application; and, on the 4th October, 1882, they presented a petition for *folle enchère* to the Superior Court, demanding the issue of a *bref de venditioni exponas*, under which the property should be resold at the risk of the appellant. In support of his application to annul the sale, the appellant alleged that he had bought the property free of all claims; that the action taken by the custom's authorities had made it impossible for the sheriff to give delivery to him in terms of the contract of sale; and that he could not obtain possession of the machinery without paying the duties claimed by the Crown, which he was under no obligation to do. On the other hand, the respondent Company alleged that the Crown had, in point of fact, no right to obtain the machinery in order to enforce payment of the customs duties. They also denied that the appellant had demanded from the sheriff delivery of the property which he had purchased, and several that the appellant had never been willing or ready to pay the price, that nothing had occurred which made it impossible for the sheriff to give delivery, and that he had, all along, been ready and willing to do so.

Mr. Justice Torrance, on the 20th December, 1882, disposed of both petitions. He held that the sheriff's sale on the 28th August had purged all privileges and hypothèques upon the property, and that the claim of the Government for customs duties could not interfere with its delivery. Being thus of opinion that no cause had been shown why the appellant Prévost "should not have possession on paying the price of "adjudication," the learned Judge dismissed his application, with costs, and gave the respondents decree in terms of the prayer of their petition.

Against that judgment Mons. Prévost appealed to the Court of Queen's Bench for Lower Canada. Before the cause was heard, the Attorney General intervened in the interest of the Crown, and prayed the Court to declare that the machinery at the time of its seizure by the sheriff was in the possession of the customs authorities, and not of the judgment debtors, and to adjudge and declare that its seizure by the Crown under the *bref d'assistance* was valid, and that the machinery was in the lawful possession of the Crown for the purpose of holding the same until the duties exigible thereon were paid.

After hearing the original parties to these petitions, and also the intervenor, for their several interests, the Court of Queen's Bench gave judgment upon the 23rd January, 1883. They held that the Crown was a preferable creditor for the amount of the customs duties payable in respect of the machinery, and, although they were of opinion that there

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was no error in the judgment of Mr. Justice Torrance, they varied his judgment by directing that the resale at the risk of the appellant should be "sujette au privilège de la Couronne sur les deniers qui re- "présenteront le prix des dites machines." They likewise altered the judgment of the Superior Court, in so far as it related to costs, and recommended, or, in other words, ordered that the whole costs incurred by the appellant Prévost and by the respondent Company in both Courts should be paid by the Crown, and should form a preferable charge upon that part of the price which was payable to the Crown in respect of customs duties.

The reasons for the judgment of the Court of Queen's Bench were delivered by chief Justice Dorion, and are, in substance, the same as the considerations expressed in the judgment of Mr. Justice Torrance. The learned Judges seem to have been unanimously of opinion that the sheriff's sale had the effect of purging the machinery of all charges, including the rights of the Crown, and that, as soon as the adjudication to the appellant Prévost was completed, on the 28th August 1882, the Crown could only prefer a claim to be ranked in the distribution of the price. Accordingly, they came to the conclusion which is thus stated by the learned Chief Justice :—"La vente, en ce qui regarde "l'appellant, est donc valable, et aussitôt qu'il aura payé son prix d'ad- "judication il pourra se faire mettre en possession des propriétés adju- "gées . et en refusant de payer son prix, il s'expose à ce que la pro- "priété soit vendue à sa folle enchère, en vertu de l'Art. 600, C. P. C." The reason assigned for their somewhat remarkable order as to costs was, that the Crown had occasioned the litigation by not intervening at an earlier stage of the proceedings.

Their Lordships are of opinion that neither the judgment of the Queen's Bench, nor that of the Superior Court, which was thereby affirmed, with variations, can be sustained. Both judgments are based upon the ground that, because the seizure by the Crown upon the 29th of August, and the subsequent detention of the machinery until payment should be made of the customs duties, were, in the opinion of the learned Judges, contrary to law, therefore it was in the power of the appellant Prévost, upon payment of the *prix d'adjudication*, to put him self in possession of the property sold to him. That is a very startling proposition. The Crown made the seizure of the machinery, and kept possession of it, in virtue of a warrant *en facie* regular ; and in this appeal, as well as before the Court of Queen's Bench, the Attorney General for the Dominion has appeared and pleaded that the Crown acted within its legal right in seizing and detaining the machinery until customs duties to an amount exceeding $20,000 were paid. The claim of the Crown might or might not be well founded, but nothing in the present case is more clearly apparent than the fact that the claim was deliberately preferred, and has been seriously insisted in, and that the ap-

pellant Prévost if he had in September 1882 paid the price of $76,000 to the sheriff, could not have obtained possession of the property which he had purchased, except by paying some $20,000 more which he was not bound to do, or by entering into a doubtful and, it might be, protracted litigation with the Crown. The practical result of the judgments in the Courts below is to relieve the seller of any obligation to give delivery of the subjects sold, and to impose upon the purchaser an obligation to pay the price, and thereafter to attain possession, in the bert way he can, it may be, after expensive litigation, and years after he has parted with the purchase money. It appears to their Lordships that such a result is inconsistent with the essential principles of the contract of sale, and is not justified by any peculiarity of the Canadian law.

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Art. 1491, C. C., declares that, whilst the rules concerning the formalities and proceedings in judicial sales are to be found in the Civil Procedure code, such sales "are subject to the rules generally applicable "to the contract of sale, when these are not inconsistent with special "laws or any article of this Code." By Art. 1491, C. C., the principal obligations of the seller, arising out of the contract of sale, are defined to be, "1, the delivery, and, 2, the warranty of the thing sold." By Art 1492 of the same Code, delivery is declared to be "the transfer of a "thing sold into the power and possession of the buyer;" whilst the following Article (1493) is to the effect that the obligation of the seller to give delivery is satisfied "when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him "and all hindrances thereto are removed."

These articles of the Civil Code merely lay down certain well known rules as to delivery, incidental to the contract of sale, which are common to most, if not to all systems of jurisprudence, and these rules are not in the least inconsistent with any of the formalities and proceedings prescribed by the Code of Civil Procedure in the case of judicial sales. Upon the completion of the contract, there immediately arise mutual rights and obligations on the part of the seller and the purchaser. When the subject of the sale is an *immeuble*, the obligation of the seller is to give the purchaser peaceable possession, and also a clear title, to enable him to defend his possession, and it is the right of the seller, upon fulfilment of that obligation, to demand and receive payment of the price. On the other hand, the obligation of the purchaser is to pay the price upon delivery of possession and of a title sufficient to protect him from eviction. Neither of the parties can exact performance from the other, except upon the condition of fulfilling his own part of the contract.

It was urged on behalf of the respondent Company that the sale to the appellant was perfected by the adjudication of the sheriff upon the 28th August 1882, and that such adjudication had the legal effect of transferring the property to the appellant, and of giving him, at the

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same time, an unencumbered title. Now, it is not matter of dispute that the sugar factory buildings and the machinery were sold together as an *immeuble*, and, that being the case, the argument of the respondent Company does not appear to be consistent with Article 706 of the Procedure Code, which declares that "no adjudication is perfect until the "price is paid, and then it conveys ownership from the time of its "date." But, assuming that the adjudication did pass the property of the thing sold to the purchaser, that would not, in the opinion of their Lordships, relieve the seller from the performance of the legal obligations incumbent upon him, arising out of the completed contract of sale. The respondent's argument upon this part of the case confounded two matters which are essentially distinct, the perfection of the contract and its due performance. If the appellant had bought a mere title there would have been room for the respondent's contention, but the thing exposed to sale by the sheriff and purchased by the appellant was a sugar factory, and the obligation of the seller, under the completed contract of sale and purchase, was to give him actual possession of the factory.

It was also suggested, in the argument for the respondents, that, in the case of a judicial sale, it lay with the purchaser to take judicial proceedings, if these became necessary, for attaining possession of the property sold to him. The suggestion was based on the terms of Article 712 of the Procedure Code, which provides that a purchaser, who cannot obtain delivery of the property sold from the judgment debtor, must demand it of the sheriff, and upon the sheriff's return or certificate of the refusal to deliver, may apply to the Court for an order commanding the sheriff to dispossess the debtor, and to put the purchaser in possession. The remedy thus provided is a summary method of ejecting the judgment debtor, whose right and interest in the property has already been extinguished by a series of regular judicial proceedings. It has no analogy to the case of a preferable claim, such as is here asserted by the Crown, coupled with actual possession by the claimant, under a formal legal warrant.

A claim of that kind, even assuming that it may ultimately prove to be invalid, can only be determined, and possession recovered, by means of a new litigation which may last for years. It would be contrary to well recognized principles of law and equity to hold, and there is no authority to be found, either in the Civil or Procedure Code, for holding that such a hindrance to the purchaser's obtaining possession must, in the case of an ordinary contract of sale, and in the absence of special circumstances, be removed by him, at his own expense, and not by the seller.

Their Lordships do not consider it necessary, for the purposes of this case, to decide any of the questions which have been argued before them, in regard to the right of the Crown, either at common law, or un-

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der the provisions of the Dominion Act, 40 Vict., c. 10, to seize and retain possession of the machinery in question. It appears to their Lordships to be quite sufficient for the decision of the case between the original parties to it, that no offer has been made to implement the sale of the 28th August, 1882, by delivering possession to the purchaser; and that, in point of fact, neither the sheriff nor the respondents have ever been in a position enabling them to give delivery to the appellant, in terms of articles 1491, 1492, and 1493 of the Civil Code.

Accordingly their Lordships will humbly advise Her Majesty to reverse the judgment of the Superior Court, dated the 29th December 1882, and also the judgment of the Court of Queen's Bench dated the 23rd January, 1883, and to grant the prayer of the appellant's petition to have it declared that he is freed from his obligation to pay the purchase money, and to dismiss the petition of the respondents for *folle enchère*, with costs to be paid by the respondents to the appellant of all the proceedings in both Courts, the respondents must also pay to the appellant his costs of this appeal. There will be no order as to the costs of the Crown.

McLeod Fullarton, counsel for Prévost in England.
Lacoste, Globensky, Bisaillon & Brosseau, attorneys for Prévost.
Sir Farrar Herschell, Q. C., and *Mr. Jeune*, in England, and
L. R. Church, Q. C., in Canada for Attorney General.
Lumly Smith, Q. C., and *Percy Gye*, counsel in England, and
J. L. Archambault, counsel in Canada for la Compagnie de Fives-Lille.

PRIVY COUNCIL.

London, July 12, 1884.

The Queen & Doutre

THE QUEEN *v.* DOUTRE.

Per Curiam. On the 1st of October, 1875, the Government of Canada addressed and sent to the respondent, Mr. Joseph Doutre, a letter, signed by Mr. Bernard, the Deputy Minister of Justice, in the following terms:—

"Sir,—The Minister of Justice desires me to state that, the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at Halifax under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel, in conjunction with Messrs. Samuel R. Thompson, Q. C, of St John, New Brunswick, and Robert L. Weatherbee, barrister, of Halifax. The Minister will be glad to know whether you

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are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject."

Upon receipt of this letter the respondent wrote in reply that he would act as requested. The respondent is a member of the Montreal section of a body of legal practitioners incorporated by cap. 72 of the Consolidated Statutes of Lower Canada, under the title of " the Bar of Lower Canada." By the terms of the statute each member of the Bar is admitted to practise as " advocate, barrister, attorney, solicitor, and proctor at law," and no person except a member of the Bar duly admitted is entitled to conduct business in any of these capacities before the Courts of Lower Canada. Every member of the Bar must be registered in the district where he intends to practise, and he becomes answerable for his conduct to the council of that district, being liable, in case of his offending against professional rule or etiquette, to censure or to suspension from office for any period not exceeding a twelve month. It is not matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit* in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar. But it is asserted for the appellant that by the law of Ontario, the Province in which Ottawa, the seat of Government, is situated, a counsel cannot sue for his fees, and that he is under the same disability according to the law of Nova Scotia, where, according to Article 23 of the treaty, the Commission was to meet. In support of that contention, counsel for the appellant referred to the opinion of Chief Justice Harrison in *M'Dougall* v. *Campbell* (41 U. C. Q. B., 332) as correctly expressing the law of Ontario, but they mainly relied upon the proposition that in those provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees nor make a valid agreement as to their remuneration, unless that right has been conferred upon them by statute.

In these circumstances it was maintained that the right of the respondent to sue for his fees must depend either upon the law of Ottawa, the *locus contractus*, or upon the law of Nova Scothia, the *locus solutionis*, and that in neither case was any suit competent to him. Were it necessary to decide all the points thus taken by the appellant, questions of much nicety would arise. It is by no means clear either that Ottawa was the *locus contractus*, or that Nova Scotia was, in the strict sense, the *locus solutionis*. It is at least a plausible view of the case that the contract was completed in Quebec at the moment of time when the respondent posted his letter accepting the employment offered him by the Minister of Justice. On the other hand, although the Commission

was to sit at Halifax, it is perfectly plain that the work expected of the respondent and actually performed by him was by no means confined to advocacy of the Dominion claims during the sitting of the Commission. His employment was not limited to what would in this country be considered the proper duties of a counsel, but embraced the work of an agent or solicitor. In point of fact, he is employed to prepare the case of the Dominion Government as well as to plead in their behalf. That such was the understanding of both parties may be inferred from the known professional *status* of the respondent, as well as from the fact that, in pursuance of the so called retainer of the 1st of October, 1875, the respondent had papers sent him, and was engaged at Quebec during eighteen months, with occasional visits to Ottawa, in collecting and putting in shape materials for framing and supporting the claim which was to be urged before the commission. Then, as regards the other questions of law raised by the appellant, there is much difficulty. Their lordships are willing to assume that the law of England, so far as it concerns the right of the bar of England to sue or make agreement for payment of their fees, was rightly applied in the case of *Kennedy* v. *Brown* (13 C.B.N.S., 677), but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Chief Justice Erle. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the bar alone excepted, can recover their fees by an action at law. But it is unnecessary, in the view which their lordships take of this case, to decide any of these questions which were raised by the argument for the appellant. The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was performed. When any advocate or other skilled practitioner is by law and the custom of his profession entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, expressed or implied, be held to have employed him upon the usual terms according to which such services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration, and it is dependent upon the *status* and rights of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in hs professional capacity. A member of the bar in England, in accordance with the law of that

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country and the rules of the profession to which he belongs, renders, and professes to render, services of a purely honorary character. If in his professional capacity as an English barrister he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country, by whose law counsel practising in the regular courts were permitted to have suits for their fees, that would not give him a right of action for his *honorarium*. His client would have a conclusive defence to such an action on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that bar are understood to practice. The respondent is a member of the Quebec section of the bar of Lower Canada, and it was in that capacity that he was retained by the government as one of their counsel before the Fisheries Commission. The respondent has the rank of Queen's Counsel conferred upon him by patent, but that circumstance does not appear to their lordships to affect the present case. It gave him a certain precedence in a question with other members of the bar, but it made no change upon the duties and obligations incumbent on him as a practising member of the bar, or upon his privileges as such, including the right to sue for his fees. The retaining letter of the 1st of October, 1875, makes no mention of fees and their lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the respondent was to be remunerated for his services upon the same terms on which these services were rendered to clients in Quebec. The respondent was engaged and undertook to go to Halifax as a Quebec counsel, subject to the same rule of his bar by which his conduct as a lawyer was regulated in Quebec, and it would be a strange result if, retaining his *status* and performing his work as a member of the Quebec Bar, he was nevertheless to be stripped of the privileges attaching to that *status* as soon as he entered the Province of Nova Scotia. A few weeks after his acceptance of the letter of the 1st of October, 1875, the respondent received a retaining fee of $1,000, and thereafter the subject of counsel's remuneration does not appear to have been considered unti May, 1877, when it was discussed at Ottawa, in the course of one or two personal interviews between Sir A. Smith, Minister of Marine and Fisheries in the government of Canada, and the respondent.

The parties are widely at variance in regard to what actually passed on the occasion of these interviews. The allegation made by the respondent in his petition is:—That on the eve of his leaving his home for Halifax in May, 1877, your petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement, under which your petitioner should be paid $1,000 a month for current expenses while in Halifax, leaving the final settlement of fees and expenses to be arranged after the closing of the Commission." On the other hand, it is alleged in the defence filed for the appellant:— "That

the arrangement made with the suppliant referred to in his petition, under which he was to be paid $1,000 a month while in Halifax, was not a temporary and provisional arrangement as alleged, but that the $1,000 a month, was, with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses." The Commission met at Halifax on the 16th of June, and brought its labours to a close on the 23d of November, 1877, having sat, with occasional adjournments, for a period of five months and seven days. In addition to the retaining fee already mentioned, the respondent received a "refresher" of $1,000, and also six monthly payments of $1,000 each during the sitting of the Commission, making a sum total of $8,000. According to the respondent, these sums were paid to him to account of his remuneration, the precise amount of his fees and expenses being left for adjustment subsequently. According to the appellant, they where paid to and received by the respondent as in full of his whole claim for fees and expenses. Both parties are agreed that in May, 1877, it was arranged that those sums (to the extent of $7,000) should be paid to the respondent, but they differ as to the footing upon which they were to be paid. Being of opinion that by the terms of his employment in 1875, the respondent was entitled to a *quantum meruit* in respect of the services which might be required of him, their lordships think that it lies with the appellant to make out that the respondent's original right to remuneration was varied by subsequent agreement, and they have also come to the conclusion that the appellant has failed to establish the existence of such an agreement. The evidence upon this poiut, which need not be referred to in detail, is very unsatisfactory. It is abundantly plain that the impression honestly derived by Sir A. Smith from his interviews with the respondent in May, 1877, was that the respondent had agreed to accept a refresher of $1,000, and a payment of the same amount monthly during the sittings of the Commission, as in full of al claims for remuneration. But in order to alter the then existing rights of the respondent, it is not enough for the appellant to show that such was the impression created in the mind of Sir A. Smith; he must also prove that the terms of the arrangement, as understood by Sir A. Smith, were understood in the same sense and were assented to by the respondent. But the respondent swears distinctly that he understood and believed the arrangement to be provisional merely; that its object was to fix the sums which were to be paid him to account, leaving the balanec payable to him for after-ajustment, and there are circumstance proved in the case which seem to establish beyond question that the respondent at the time sincerely entertained that belief. Then the evidence of Mr. Whitcher, the Commissioner of Fisheries for Canada, and the only third party present at these interviews, is not only very inconclusive, but what he does state, as to the language actually used by the principal parties to the arrangement then made, tends to support the respond-

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ent's understanding of its terms. In that state of the evidence, their lordships are unable to hold that the appellant has satisfied the *onus* incumbent on him of proving the new arrangement alleged in his defence. In the courts below, while the learned judges were equally divided as to the result of the case, there was a remarkable diversity of judicial opinion in regard to the law applicable to its decision. The cause was tried before Mr. Justice Fournier, who, on the 12th of January, 1881, gave judgment in favour of the respondent, and fixed the amount of fees and expenses still remaining due to him in remuneration of his services at $8,000, and it is not maintained that the amount awarded by the learned judge is excessive, if the respondent has a right of action and that right is not barred by the alleged arrangement of May, 1877. The cause was then taken by appeal before the Supreme Court of Canada, who gave their judgment on the 13th of May, 1882. Chief Justice Ritchie and Justices Strong and Gwynne were in favour of allowing the appeal, but Mr. Justice Fournier, who was a member of the Full Court, adhered to the view which he had taken as judge of first instance, and Justices Henry and Taschereau, in substance, agreed with him. In consequence of this equal division of opinion in the Supreme Court, the order appealed from was confirmed, and the appeal dismissed, with costs. Their lordships do not consider it necessary to notice the great variety of reasons assigned by the learned judges of the Supreme Court in support of the views which were severally adopted by them, with the exception of one point raised in the judgment of Mr. Justice Gwynne. That point is deserving of notice for this reason—that if the opinion of the learned judge, which is based on the provisions of the Petition of Right Act of Canada, be well founded, the respondent, though he might have suit for recovery of his fees from any subject, could not recover them, by petition, from the Crown. By a pardonable error, Mr. Justice Gwynne refers to the Act of 1875, instead of the Petition of Right Canada Act, 1876 (39 Vict., c. 27), which repealed the statute of the previous year. Section 19, which is identical, in expression, with the similar circumstances of the repealed act, provides "that nothing contained in this act shall give to the subject any remedy against the crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances, by the laws in force there prior to the passing of the imperial statute 23 and 24 Vict., c. 34." The learned judge seems to hold that these provisions place a Quebec lawyer on perfectly the same footing as an English barrister, so far as regards his right to proceed against the Crown for recovery of his fees. But it appears to their lordships that the process of reasoning by which the learned judge arrives at that conclusion confounds two things which are essentially different—"right" and "remedy." The statute does not say that a Quebec lawyer shall, in all cases, have only the same right against the Crown as a member of the English bar. What it does

enact is that no subject in Canada shall be entitled to the "remedy" provided, unless he has a legal claim, such as could have been enforced by petition of right in England prior to the Imperial Act of the 23rd and 24th Victoria. It is impossible to hold that a member of the Quebec bar who, by law and practice, is permitted to sue for his fees, when he seeks his remedy against the Crown, under the Canadian Act of 1876, has not such legal claim, and that he sues under circumstances similar to those in which an English barrister is placed who, neither by the usage of his profession nor the law of his domicile, can maintain any action for his fees. Their lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the courts below, and to dismiss the appeal, with costs. The Queen & Doutre

Judgment affirmed.

The *Solicitor General* and Mr. *Jeune* for the Crown.

Mr. *McLeod Fullarton* for the respondent.

PRIVY COUNCIL.

December 29, 1885.

Present:—THE QUEEN'S MOST EXCELLENT MAJESTY, LORD PRESIDENT, DUKE OF RICHMOND and GORDON, SIR FRANCIS SANDFORD. Sweeny & Bank of Montreal.

SWEENEY v. BANK OF MONTREAL

Whereas there was this day read at the Board, a Report from the Judicial Committee of the Privy Council, dated 12th December, 1885, in the words following, viz.:

"Your Majesty having been pleased by your general order-in-council of the 18th November, 1885, to refer unto this Committee the matter of a humble Petition of the Bank of Montreal in the matter of an Appeal from the Supreme Court of Canada between the Bank of Montreal (Defendants), Appellants, and Dame Emily Sweeney (Plaintiff), Respondent, setting forth that this is a petition for a special leave to appeal from a decision of the Supreme Court of Canada, reversing a decision of the Court of Queen's Bench for Lower Canada (Appeal Side), which confirmed a decision of the Superior Court for Lower Canada sitting at Montreal. The action was brought on the 23rd of May, 1881, by Dame Emily Sweeney (hereinafter called the respondent), against the Bank of Montreal (hereinafter called the Appellants), for the purpose of having it declared that she was the owner of 30 shares in the Montreal Rolling Mills Company, of the par value of $100 a share, and of having such shares transferred or the value paid to her. The material facts of the

Sweeny & Bank of Montreal.

case; as appearing in the evidence, are as follows:—A letter dated the 18th of March, 1871, from Messrs. Crawford & Lockhard, of Belfast, in Ireland, to James Rose, was tendered in evidence, which showed that Messrs. Crawford & Lockhard remitted through the appellants' bank by the direction of the family of the respondent to James Rose, the sum of $9,930.71. An entry in the books of Morland, Watson & Co., of which Rose was a partner, was tendered in evidence, which showed that Rose transferred the above sum to his credit to Morland, Watson & Co., and that he drew out part of such sum or of a further sum added thereto by Messrs. Crawford & Lockhard (as to which the evidence was similar), on the 4th of April, 1871. An account entered as the account of "James Rose in trust" in the books of the Montreal Rolling Mills Co. was tendered in evidence, which showed that on the 4th of April, 1871, Rose invested $4,000 in the purchase of four shares in the Montreal Rolling Mills Co. of $1,000 each. On the 11th of April, 1871, Rose obtained from the Montreal Rolling Mills Co. a certificate numbered 0,058, certifying that Rose "in trust" was the holder of three shares of $1,000 each: the certificate stated on its face that the shares were transferable only on the books of the Company: subsequently the value of the shares of the Montreal Rolling Mills Co., was changed from $1,000 to $100 each: on the 3rd of June, 1879, Rose transferred to Buchanan, as the manager of the appellants' bank, 250 shares of $100 each in the Montreal Rolling Mills Co., and on the 13th of March, 1879, a furthur amount of 60 similar shares: the two instruments of tranfer state the transfers to be from James Rose "in trust" to W. J. Buchanan, "in trust." but do not state anything as to the nature of the trust in either case, or who were the cestuis que trustent: Buchanan had no knowledge that Rose held the shares in trust for the respondent or any particular person, or otherwise than as appeared on the face of the certificate and the books of the Montreal Rolling Mills Co., that the holding of the shares was affected by any trust: the above transfer was given as collateral security for advances by the appellants to Rose personally: Rose was at all times thereafter largely indebted to the appellants: the respondent was unaware of the transfer to Buchanan until she was informed of the same by a letter from Rose to her, dated the 6th of January, 1880: it was stated in evidence by Rose that he gave the certificate No. 0,008 to the Respondent, but it was not proved when the certificate was given to her; it was also so stated by Rose that he paid respondent the dividends declared on the said shares before the 1st January, 1880, but no evidence was given to show that the respondent knew what the nature and source of the sums so paid to her were: on the 21th of January, 1881, protests were served on behalf of the respondent on the appellants and the Montreal Rolling Mills Co.: the pleadings in the case are not herein stated, as the points at issue fully appear from the judgments hereinafter referred to: on the 24th of December, 1881, Mr. Justice Rainville

as judge of the Superior Court for Lower Canada, sitting at Montreal, gave judgment in favor of the appellants: the case was heard on appeal before the Court of Queen's Bench for Lower Canada (Appeal side), constituted by Sir A. A. Dorion, C. J., Monk, Baby, Doherty and Caron, JJ.: judgment was given on the 25th September, 1884, for the appellants: the learned judges of the Court of Queen's Bench were unanimous in favor of the appellants, and the judgment was delivered by the Chief Justice, by which the judgment dismissing the action af the appellants was confirmed: on the 10th and 11th of March, 1885, the case was heard on appeal before the Supreme Court of Canada, constituted by Ritchie, C. J., Strong, Fournier, Henry and Taschereau, JJ., and on the 22nd of June, 1885, judgment was given by Ritchie, C.J., Fournier and Taschereau, JJ., for the respondent; Strong, J., dissenting; Mr. Justice Henry does not appear to have delivered any reasons: it is submitted that the judgment in favor of the respondent in the Supreme Court, proceeded chiefly, if not entirely, upon the principles and authorities of English and American law relating to trusts, and not on the law in force in the Province of Quebec, and that it is of the utmost importance that questions of law should be decided according to the system of law of the province in which they arise, and especially that the doctrines of English law relating to trusts and notice should not be applied in cases in the Province of Quebec, where they are not legally applicable: it is submitted further that questions of great and general importance on the subject of the law of Quebec in regard to trusts are raised in this case, and that it is important the present decision of the Supreme Court should not be allowed to stand as a precedent: it is submitted further that in the present case important questions of the admissibility of evidence in the court of the Province of Quebec, according to the law in force there, were raised and were erroneously decided; the above questions are of great importance to the appellants and other bankers in the Province of Quebec in the conduct of their business: deposits of shares, of which the certificate states them as in the present case to be held "in trust," are frequent and it appeared in evidence that the appellants have never regarded these words as putting them on inquiry or limiting the rights of the holders of the shares so to deal, with them; and humbly praying that your Majesty in council will be pleased to order that the petitioners shall have special leave to appeal from the said judgment of the Supreme Court of Canada of the 22nd June, 1885, and that the Supreme Court of Canada may be ordered to transmit forthwith their transcript of their proceedings and evidence on which such judgment was given to the Privy Council office or for other relief in the premises.

The Lords of the Committee, in obedience to your Majesty's said general order of reference, have taken the said humble petition, for leave to appeal, into consideration, and having heard counsel on behalf

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of petitioners, their Lordships do this day agree humbly to report as their opinion to your Majesty, that leave ought to be granted to the Bank of Montreal to enter and prosecute their appeal from the said judgment of the Supreme Court of Canada of the 22nd June, 1855, upon depositing in the Registry of the Privy Council the sum of £300 sterling as security for the costs of the respondent in case the said appeal should be dismissed, and their Lordships do further report to your Majesty that the Registrar of the Supreme Court of Canada ought to be directed to transmit to the Registrar of the Privy Council, without delay, authenticated copies under the seal of the said court of the record, pleadings, proceedings and evidence proper to be laid before your Majesty on the hearing of this appeal, upon payment by the appellants of the usual fees for the same."

Her Majesty having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the said Bank of Montreal be and the same is hereby allowed to enter and prosecute their said appeal from the judgment of the Supreme Court of Canada of the 22nd June, 1885, uppn depositing in the registry of the Privy Council the sum of £300 sterling, as security for the costs of the respondent in case the said appeal should be dismissed, and the registrar of the Privy Council without delay, authenticated copies under the seal of the said court of the record, pleadings, proceedings and evidence proper to be laid before Her Majesty on the hearing of this appeal, upon payment by the appellants of the usual fees for the same.

Whereof the Governor-General, Lieutenant-Governor or Commander-in-Chief of the Dominion of Canada for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

London, June 25, 1887.

Coram THE LORD CHANCELLER, LORD HOBHOUSE, LORD MCNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH.

THE BANK OF MONTREAL v. SWEENY.

Their Lordships consider it to be proved in this case that Rose held the disputed shares upon a trust not disclosed by the entry in the Company's books; that he transferred them to the Bank in breach of his trust; that at the time of the transfer the Bank knew of Rose's position; and that the plaintiff turns out to be the person in whose favor the trust existed.

It has been argued for the appellants that these things are not proved, because they require a written *commencement de preuve*, and have not got it. But on this point their Lordships stopped the respondent's counsel. They are quite clear that if a written *commencement* is needed, it is to be found in the letters of Crawford and Lockhart coupled with the books of the Rolling Mills Company, and in the transfer executed by Rose to Buchanan on the 3rd June 1876.

Under these circumstances the question arises whether the Bank must not be in the same position as if they had known that the plaintiff was interested in the shares, and that the transfer by Rose was in violation of his duty to the plaintiff. Their Lordships do not impute moral blame to Mr. Buchanan or to any agent of the Bank, for those gentlemen may be guilty of nothing more than a mistake of law. Nor do they think it necessary to examine how far the relations between Rose and the plaintiff may have ressembled or differed from those of an English trustee and his beneficiary, or to go into the English doctrines of constructive fraud, or constructive notice. The Bank had express notice that as regards the property transferred to them Rose stood to some person in the relation expressed by the words "in trust," and the only question is what duty was cast upon the Bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorized by the nature of his trust. In fact they made no inquiry at all about the matter following-as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was nobody with a prior title to demand a transfer from Rose, and as the plaintiff is such a person they cannot retain the shares against her claim.

Their Lordships are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs. If indeed they found any princi-

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ple of Quebec law which absolutely forbad that property should be placed in the name of a person, with a simultaneous notice providing his power over it should not be absolute but restricted, that would control their decision. That view has been pressed upon them from the bar with great ability and force, but, as they hold, without authority to support it. The authorities cited relate to *mandataires prête-noms*, and are to effect that, when once Property has been placed under the dominion of such an agent, third parties may safely deal with him alone, even though notice is given to them that his principal is not assenting to his acts. Their Lordships think it unnecessary to examine this statement of the powers of a *mandataire prête-nom*, for they find no definition or description of such an agent which does not require that he should have a *titre apparent*, which they understand to mean that he must be ostensible owner, made to appear to the world as absolute owner. They asked whether there was any text or case to show that an agent can be a *mandataire prête-nom* when the instrument conferring the property on him carried upon its face a declaration that his property is qualified. No such authority could be found. In this case Rose was never for an instant held out to the world as absolute owner, and therefore he never could have given a good title to a third party by his own sole authority.

Then it was argued that the words "in trust" do not show a title in any other person, and that they might be merely a mode of distinguishing one account from another in the Company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly show the infirmity or insufficiency of Rose's title; and those who choose to rely on such a title cannot complain when the true owner comes forward to claim his own.

It is worthy of remark that, in their plea, the appellants claim to be the true owners of the shares upon the very same principle upon which the plaintiff's claim is founded. Rose did not transfer them to the Bank by name, but to Buchanan "in trust." The appellants aver that this transfer was made as security for a debt due from Rose to them, and that the shares "are now legally held for the said Bank."

If that is the essential truth of the transaction as between Buchanan and the Bank, why should it be otherwise as between Rose and the plaintiff?

The result is that their Lordships agree in all material points with the Supreme Court of Canada. They will humbly advise Her Majesty to affirm the decree of that Court, and dismiss the appeal. The appellants must pay the costs.

Judgment confirmed.

W. W. Robertson, Q. C., counsel for appellant.

W. H. Kerr, Q. C., counsel for respondent.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

December 13, 1879.

Present—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK SIR MONTAGUE E. SMITH, and SIR R. P. COLLIER.

VALIN *v.* LANGLOIS.

Their Lordships have carefully considered the able argument which they have heard from Mr. Benjamin, and they feel glad that so full an argument has been offered to them, because there can be no doubt that the maiter is one of great importance. The petition is to obtain leave to appeal from two concurrent judgments of the Court of first instance and of the Court of Appeal, affirming the competency and validity of an Act of the Dominion Legislature of Canada. Nothing can be of more importance certainly than a question of that nature, and the subject matter also, being the mode of determining election petitions in cases of controverted elections to seats in the Parliament of Canada, is beyond all doubt of the greatest general importance. It, therefore, would have been very unsatisfactory to their Lordships to be obliged to dispose of such an application without at least having the grounds of it very fully presented to them. That has been done, and I think I may venture to say for their Lordships generally that they very much doubt whether, if there had been an appeal and counsel present on both sides, the grounds on which an appeal would have been supportèd, or might have been supported, could have been better presented to their Lordships than they have been on the present occasion by Mr. Benjamin.

In that state of the case their Lordships must remember on what principles an application of this sort should be granted or refused. It has been rendered necessary by the legislation which has taken place in the colony, to make a special application to the Crown in such a case for leave to appeal, and their Lordships have decided on a former occasion that a special application of that kind should not be lightly or very easily granted ; that it is necessary to show both that the matter is one of importance, and also that there is really a substantial question to be determined. It has been already said that their Lordships have no doubt about the importance of this question, but the consideration of its im portance and the nature of the question tell both ways. On the one hand, those considerations would undoubtedly make it right to permit an appeal if it were shown to their Lordships *prima facie*, at all event, that there was a serious and a substantial question requiring to be determined. On the other hand, the same considerations make it unfit and inexpedient to throw doubt upon a great question of constitution, allaw and upon a decision of the Court of Appeal there, unless their Lordships are satisfied that there is *prima facie* a serious and substantial question requiring to be determined. Their lordships are not satisfied in this case

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that there is any such question, inasmuch as they entertain no doubt that the decisions of the lower Courts were correct. It is not to be presumed that the Legislature of the Dominion has exceeded its powers, unless upon grounds really of a serious character. In the present case their Lordships find that the subject matter of this controversy— that is, the determination of the way in which questions of this nature are to be decided as to the validity of the return of members to the Canadian Parliament—is beyond all doubt placed within the legislative power of the Dominion Parliament by the 41st section of the Act of 1867, to which reference has been made. Upon that point no controversy is raised. The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised. The only ground on which it is alleged to have been incompetently exercised is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the Provincial and the Dominion Legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the Legislatures of the Province. One of those classes of subjects is defined in these words, by the 14th sub-section of the 92nd clause : " The administration of justice in the Province, including the constitution, maintenance and organizatien of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts." The argument, and the sole argument, which has been offered to their Lordships to induce them to come to the conclusion that there is here a serious question to be determined is that the Act of 1874, the validity of which is challenged, contravenes that particular provision of the 92nd section which exclusively assigns to the Provincial Legislatures the power of legislating for the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts of civil and criminal jurisdiction, and including procedure in civil, not in criminal, matters in those Courts. Now, if their Lordships had for the first time, and without any assistance from anything which had taken place in the colony, to apply their minds to that matter, and even if the 41st section were not in the Act, it would not be quite plain to them that the transfer of the jurisdiction to determine upon the right to seats in the Canadian Legislature—a thing which had been always done, not by Courts of Justice, but otherwise—would come within the natural import of those general words : " The admistration of justice in the Province, and the constitution, maintenance and organization of Provincial Courts, and procedure in civil matters in those Courts." But one thing is clear, that those words do not point expressly, or by any necessary implication, to the particular subject of election petition ; and when we find in the same Act another clause which deals expressly with those petitions, there is not the smallest difficulty in

taking the two clauses together, and in placing upon them both a consistent construction. That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the Parliament of Canada should otherwise provide. It was, therefore, the Parliament of Canada which was otherwise to provide. It did otherwise provide by the Act of 1873, which Act it afterwards altered, and then passed the Act now in question. So far, it would appear to their Lordships very difficult to suggest any ground upon which the competency of the Parliament of Canada so to legislate could be called in question. But the ground which is suggested is this: that it has seemed fit to the Parliament of Canada to confer the jurisdiction necessary for the trial of election petitions upon Courts of ordinary jurisdiction in the Provinces; and it is said that although the Parliament of Canada might have provided in any other manner for these trials, and might have created any new Court for this purpose, it could not commit the exercise of such a new jurisdiction to any existing Provincial Court. After all their Lordships have heard from Mr. Benjamin, they are at a loss to follow that argument, even supposing that this were not in truth and in substance the creation of a new Court. If the subject matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the Provincial Parliament, and that which is excluded by the 91st section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the class of subjects assigned exclusively to the Legislatures of the Provinces. The only material class of subjects relates to the administration of justice in the Provinces, which, read with the 41st section cannot be reasonably taken to have anything to do with election petitions. There is, therefore, nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces. But. in addition to that, it appears that by the Act of 1873, which, even by those judges who are said to have disputed the competency of the Act 1874, is admitted to have been competent to the Dominion Parliament, what appears to their Lordships to be exactly the same thing in substance, and not so very different even in form, was done. It was intended that when a Court of Appeal should be constituted for the Dominion, a judge of that Court of Appeal should be the judge in the first instance of election petitions, and three judges of the same Court should have power to sit in appeal from any judgment of a single judge. But it was necessary also to provide for the interval between the passing of the Act and the constitution of such a Court of Appeal, and that Act of 1873 provided that in the meantime the judges of existing Provincial Courts should exercise under regulations contained in it the same jurisdiction. It did not, indeed, say the Courts—it said

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the judges of the Courts, and that is really in their Lordships' view the sole difference for this purpose between the Act of 1873 and the Act of 1874. The Act of 1874 in substance does the same thing, except that in the definition clauses it uses this language:—"The expression 'the Court,' as respects elections in the several Provinces hereinafter mentioned respectively shall mean the Courts, or any of the judges thereof"; and then it mentions by their known names the existing Courts of the different Provinces. When their Lordships go on to look at the provisions which follow in the Act, it is clear not only that a new jurisdiction is provided for, but even the power to take evidence. It is said that a single judge in rotation, and not the entire Court, is to exercise this jurisdiction, and in the forty-eighth section:—"That on the trial of an electiou petition, and in other proceedings under this Act, the judge shall, subject to the provisions of this Act, have the same powers of jurisdiction and authority as a judge of one of the Superior Courts of Law and Equity for the Province in which such election is held, sitting in term or proceeding at the trial of an ordinary civil suit, and the Court held by him in such trial shall be a Court of Record" Words could not be more plain than those to create this as a new Court of Record, and not the old Court, with some superadded jurisdiction to be exercised, as if it had been part of its old jurisdiction; and all that is said as to the employment of the same officers, or any other machinery of the Court for certain purposes defined by reference to the existing procedure of the Courts, shows that the Dominion Legislature was throughout dealing with this as a new jurisdiction created by itself, although in many respects adopting, as it was convenient that it should adopt, existing machinery. Therefore, their Lordships see nothing but a nominal, a verbal, and an unsubstantial distinction between this latter Act as to its principle and those provisions of the former Act, which all the judges of all the Courts in Canada, apparently without difficulty, held to be lawful and constitutional. Their Lordships are told that some of the judges of the Courts of first instance have thought there was more of substance, in the distinction than there appears to their Lordships to be, and have declined to exercise this jurisdiction. It has been said that five judges have been of that opinion. On the other hand, two judges of the first instance, I think both in the Province of Quebec, the Chief Justice in the present case, and in another case Mr. Justice Caron, a judge whose experience on the Cahadian Bench has been long, and whose reputation is high, have been of opinion that this law was perfectly within the competency of the Dominion Legislature, and they could see nothing in the distinction taken between the present law as to its principle and the former; and now the question has gone to the Court of Appeal the Supreme Court of Canada, who constituted as a full Court of four judges, have unanimously been of that opinion, and nothing has been stated to their Lordships,

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even from those sources of information with which Mr. Benjamin has been supplied, and which he has very properly communicated to their Lordships—nothing has been stated to lead their Lordships at all to apprehend that there is any real probability that any judge of the inferior Courts will hereafter dispute their obligation to follow the ruling of the Supreme Court, unless, and until, it shall be reversed by Her Majesty in Council. Nothing has been said from which their Lordships can infer that any Provincial Legislature is likely to offer any opposition to such a ruling on this question as has taken place by the Court of Appeal, unless, as has been said, it should at any future time be reversed by Her Majesty in Council. Under these circumstances their Lordships are not persuaded that there is any reason to apprehend difficulty or disturbance from leaving untouched the decision of the Court of Appeal. Their Lordships are not convinced that there is any reason to expect that any of the Judges of the Court below will act otherwise than in due subordination that the appellate jurisdiction, or refuse to follow the law as laid down by it. If indeed, the able arguments which have been offered had produced in the mind of any of their Lordships any doubt of the soundness of the decision of the Court of Appeals, their Lordships would have felt it their duty to advise Her Majesty to grant the leave which is now asked for, but on the contrary the result of the whole argument has been to leave their Lordships under the impression that there is here no substantial question at all to be determined, and that it would be much more likely to unsettle the minds of Her Majesty's subjects in the Dominion, and to disturb in an inconvenient manner the legislative and other proceedings there, if they were to grant the prayer of this petition, and so throw a doubt on the validity of the decision of the Court of Appeal below, than if they were to advise Her Majesty to refuse it. Under these circumstances their Lordships feel it their duty humbly to advise Her Majesty that this leave to appeal should not be granted, and that the petition should be dismissed.

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